SUGUMAR BALAKRISHNAN

v.

PENGARAH IMIGRESEN NEGERI SABAH & ANOR & ANOTHER APPEAL

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
DENIS ONG JCA
[CIVIL APPEAL NO: S-01-202-1997]
17 JUNE 1998

ADMINISTRATIVE LAW: *Remedies - Certiorari - Exercise of administrative powers - Cancellation of entry permit to enter Sabah - Validity - Whether decision amenable to judicial review - Whether must be in accordance with law - Whether must be substantively fair - Whether certiorari should issue - Rules of the High Court 1980, O. 53 - Immigration Act 1963, ss. 9(1)(c), 14, 59, 59A, 65(1) - Federal Constitution, arts. 5(1), 8(1)*

ADMINISTRATIVE LAW: *Exercise of judicial powers - Judicial review - Nature and scope - Whether concerned with decision-making process as well as with decision itself - Whether forming an essential feature of the Federal Constitution - Whether fettered by ouster clause in statutes - Federal Constitution, arts. 5(1), 8(1) - Immigration Act 1963, ss. 59, 59A*

CONSTITUTIONAL LAW: *Courts - Judicial power - Power of High Court to review administrative acts and decisions - Whether fettered by ouster clause in statutes - Right to judicial review - Whether forming part of "personal liberty" of a citizen - Article 8(1) of Federal Constitution - Whether imposing a duty upon public decision-maker to act fairly - Federal Consitution, arts. 5(1), 8(1)*

IMMIGRATION: *Cancellation of entry permit - East Malaysian states - Power over immigration matters - Whether an East Malaysian state has untrammelled power to direct cancellation of an entry permit - "Low private morals" - Whether constituting lawful ground for cancelling an entry permit - Federal Constitution, arts. 5(1), 8(1) - Immigration Act 1963, ss. 9(1)(c), 14, 59, 59A, 65(1)*

STATUTORY INTERPRETATION: *Canons of construction - Noscitur a sociis rule - Meaning of "morality" - Section 9(1)(c) of Immigration Act 1963 - Whether means "public morality"*

STATUTORY INTERPRETATION: *Sections 59, 59A of Immigration Act 1963 - Ouster clause - Ouster of judicial review - Effect - Whether protects only those acts and decisions made in accordance with law - Whether only deprives an aggrieved person of audi alteram partem rule - Whether having no effect on other facets of procedural fairness*

WORDS & PHRASES: *"Morality" - Section 9(1)(c) of Immigration Act 1963*

The appellant is a Malaysian citizen and had been residing in Sabah since 1975 pursuant to a Work Pass. In 1985 the appellant was admitted to the Sabah Bar and had been practising law in that State ever since. Notwithstanding the long stay, the appellant, was not a permanent resident of Sabah and did not therefore "belong to Sabah" by virtue of s. 71(1)(a) of the Immigration Act 1963 ('the Act'). The appellant intended to put his stay in Sabah on a more permanent basis and subsequently took steps to apply for an Entry Pass. In consequence, on 27 December 1995, the first respondent granted the appellant an Entry Pass, and following that, the appellant was allowed to reside in Sabah for two years. It was clear that, at the end of the period, according s. 71(1)(a) of the Act, the appellant would be a person "belonging to Sabah".

The second respondent, the State Authority of Sabah, in the meanwhile, formed the view that the appellant was a man of low morals and that his continued presence in Sabah was prejudicial to the morality of Sabah. In the circumstances, invoking the power given it by s. 65(1)(c) of the Act, the second respondent directed the first respondent to cancel the appellant's Entry Permit, and so, on 12 November 1997, the first respondent cancelled the appellant's Entry Permit and gave the latter seven days within which to leave Sabah.

The appellant took out an *ex parte* originating motion for leave to issue *certiorari* to quash the first respondent's decision, and leave was granted by Suleiman Hashim J. In granting leave, however, the learned judge refused to order that such leave operate as a stay, on the ground that a stay order, being in the nature of an injunction, violates s. 54(d) Specific Relief Act 1950 as well as s. 29(2) Government Proceedings Act 1956. The appellant has since appealed against the refusal.

The appellant's substantive motion for orders of *certiorari* subsequently came before Ian Chin J whereupon the appellant argued *inter alia* that the first respondent, in cancelling the Entry Permit, had acted unlawfully, as he could only act or cancel the permit under s. 14 of the Act but had acted instead under s. 65 thereof. The learned judge, whilst admitting that the application before him was governed by s. 14 of the Act, and not by s. 9(1)(c) as

contended by the State Attorney General, nonetheless dismissed the application. It was the learned judge's view that judicial review was effectively abrogated by the ouster clause in s. 59A of the Act, and further that, the first respondent's decision, in the context of ss. 14 and 65, was not vitiated by any error of law.

The facts also showed that a further argument was raised by the appellant before the learned judge, namely, that the present case was not one which involved public policy, national interest or national security, and that being so, the court was dutybound to carry out an objective examination of the factual matrix presented to it so as to ascertain whether a reasonable tribunal, similarly circumstanced, would have come to the decision the first respondent did, citing in support thereof *R Rama Chandran v. Industrial Court of Malaysia; Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* and *Harris Solid State Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors.* The learned judge held however that these cases were not concerned with the right of the East Malaysian states over immigration matters, and so, ruled the cases so cited irrelevant.

The appellant, in consequence, also appealed against the learned judge's refusal to grant him the orders of *certiorari*, and before the Court of Appeal, questions arose as to: (i) whether the learned judge fell into error in not granting stay herein; (ii) whether in the circumstances the High Court was precluded from exercising its powers of judicial review; (iii) whether the appellant's application was governed by s. 9(1)(c) and not s. 14 of the Act, and if so, whether "morality" in s. 9(1)(c) means "public morality" and not the personal morality of an individual; (iv) whether bad moral character constituted a ground upon which the State Authority could direct the cancellation of an Entry Permit and thereby prevent a person from "belonging" to Sabah under s. 71 of the Act, and in any case, whether the decision to cancel the appellant's Entry Permit was substantively fair; and (v) whether the learned judge was wrong in refusing *certiorari*.

Held:
Per Gopal Sri Ram JCA

[1] Suleiman Hashim J was entirely correct in granting leave despite the appellant's failure to have resort to provisions of the Act under which the remedy of an appeal to the Minister was available. The appellant was only given seven days to leave Sabah and serious injury to his livelihood was imminent. The Act also does not provide for a stay of a decision pending appeal to the Minister. The remedy of an appeal was clearly not as efficacious as *certiorari*.

[2] The learned judge, however, fell into error in equating a stay with an injunction in the environment of public law remedies. In the context of O. 53 r. 1(5) Rules of the High Court 1980 ('RHC'), an order of stay temporarily suspends the effect of a public law decision pending the outcome of *certiorari* or prohibition proceedings. By contradistinction, an injunction restrains or directs a party to a proceeding and thus acts in personam. It follows that an order for stay is not in law an injunction. Both s. 54(d) Specific Relief Act 1950 and s. 29(2) Government Proceedings Act 1956 do not therefore curtail the power conferred upon a High Court by O. 53 r. 1(5) RHC. The judge was therefore wrong in not granting stay.

[2a] Further, s. 29(2) of the Government Proceedings Act 1956 speaks of "civil proceedings", and "civil proceedings", by virtue of s. 2 of the Act, does not include "such proceedings as would in England be brought on the Crown side of the Queen's Bench Division". It is trite that when the Government Proceedings Act was enacted, the only proceedings that were brought on the Crown side of the Queen's Bench Division were applications seeking prerogative relief such as *certiorari*, prohibition, *quo warranto* etc. By definition therefore, such proceedings are not "civil proceedings" for the purposes of the Government Proceedings Act. Consequently, s. 29 has no application to applications for *certiorari* and other prerogative relief.

[3] Judicial review is a basic and essential feature of the Constitution and, excepting cases involving national security or national interest to which special consideration would apply, no law passed by Parliament in exercise of its constituent power can abrogate it or take it away. Section 59A of the Act, therefore, cannot and does not preclude the High Court from exercising its powers of judicial review to examine the validity of the exercise of administrative powers conferred by the Act both on substantive as well as procedural grounds. An ouster clause in a statute, in any case, immunizes from judicial review only those administrative acts and decisions that are not infected by an error of law.

[3a] Like the expression "life" in art. 5(1) of the Constitution, which must receive a broad and liberal interpretation, the words "personal liberty" in art. 8(1) must similarly be interpreted. It follows that the liberty of an aggrieved person to go to court and seek relief, including judicial review of administrative action, is one of the many facets of the personal liberty guaranteed by art. 8(1) of the Federal Constitution.

[4] Section 14 of the Act has no application in the present instance being a provision that applies to immigrants generally. The instant case is rather governed by s. 9(1)(c), which specifically confers power upon the first respondent to cancel an Entry Permit granted to persons entering the Federation of Malaysia or any part thereof. The learned judge therefore misdirected himself in law when he failed to have any regard to this section of the Act.

[4a] Applying the *noscitur a sociis* rule of construction, the expression "morality" in s. 9(1)(c) of the Act means "public morality" and not the personal or private morality of an individual. Hence, the private morality of a person is an irrelevant consideration for purposes of cancellation of that person's Entry Permit under s. 9(1)(c) of the Act.

[5] While the East Malaysian states have certain rights and privileges reserved unto them by the Federal Constitution, particularly in matters pertaining to immigration, they, like the Federal Government and the government of any of the West Malaysian states, are bound by the terms of the Federal Constitution.

[5a] It was not the intention of Paliament to confer untrammelled power on the state authority of an East Malaysian state to direct the cancellation of an Entry Permit. As shown by the opening words of s. 65(1), the legislative intent points to quite the opposite direction. The said words "In exercising his powers under Parts I to VI" refer to the sections in those six Parts of the Act, one of which is s. 9(1)(c) which circumcribes the power of cancellation. It follows that, in the context of an East Malaysian state, the statutory pre-conditions appearing in s. 9(1)(c) *mutatis mutandis* govern the cancellation of an Entry Permit by the State Authority. The second respondent, therefore, could only direct the first respondent to cancel the appellant's Entry Permit after being objectively satisfied that one or more grounds as set out in s. 9(1)(c) existed.

[6] It was clear that the Entry Permit herein was directed to be cancelled because of the appellant's private morals. Such consideration being not one of those prescribed by s. 9(1)(c) of the Act, the decision to cancel the appellant's Entry Permit was not in accordance with law. This is not at all a case of a person whose presence in Sabah is prejudicial to public morality, which is the consideration the Act has made relevant for purposes of cancelling an Entry Permit.

[7] It may be that s. 59 has sought to do away with the *audi alteram partem* limb of the rules of natural justice in the circumstances postulated by that section. The rules of natural justice however are a flexible concept

whose categories are not closed. Further, they merely form part of a much wider doctrine, ie, the duty to act fairly. In any case, art. 8(1) of the Federal Constitution imposes a duty upon a public decision-maker to act fairly. The second respondent is no different and must act fairly in exercising the powers conferred upon it by the Act.

[8] As shown by *R Rama Chandran v. Industrial Court of Malaysia*, *inter alia*, judicial review is no longer only concerned with the decision making process, but also with the decision itself. The duty to act fairly now comprises of two limbs, namely procedural fairness **and** substantive fairness. It follows that a decision may be struck down as being contrary to **substantive principles.**

[8a] Whether the decision to cancel the appellant's Entry Permit was substantively fair is a question which the learned judge did not consider at all. By such failure to consider the question, the learned judge seems to have misunderstood his role in judicial proceedings. The learned judge also did not evaluate the affidavit evidence presented to him and this constitutes a serious non-direction on his part.

[8b] Although the learned judge did refer to *Rama Chandran* he did not sufficiently appreciate the wealth of public law jurisprudence flowing out from the majority judgments in that case. The learned judge, by treating *Rama Chandran* and the other cases merely as decisions upon their own facts, had adopted too narrow an approach. Clearly, these are cases that lay down important principles of public law and are authority for the proposition that judicial review of a public law decision is not confined to procedural fairness but includes substantive fairness.

[8c] The learned judge had also adopted too narrow an approach when he confined himself to the narrow question posed by counsel for the appellant, namely that the first respondent could only act under s. 14 of the Act, and then looked for some specific misdirection of law on the part of the first respondent in the context of ss. 14 and 65 of the Act. An error of law in the context of public law is a broad concept and is not limited to a mere misconstruction by a decision-maker. It would be disclosed if the decision-maker asks himself the wrong questions or takes into account irrelevant considerations or omits to take into account relevant considerations (ie, *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of general law.

[8d] Indeed the learned judge entirely missed the issue which was canvassed at length before him by the appellant's counsel. Unlike *Rama Chandran* and *Harris Solid State*, here is not a case where the court was moved to substitute its decision for that of the second respondent State Authority. Had such an attempt been made, then, and then only, would the public policy considerations to which the judge alluded have become relevant. In the state in which the application rested before him, public policy was a wholly irrelevant consideration. The judge ought to have ignored it.

[9] Whilst the learned judge was right in holding that the first respondent need not furnish reasons for cancelling the appellant's Entry Permit, he was wrong in the grounds he has advanced for his said conclusion. The fact is that neither s. 59 nor s. 59A have the effect of excluding the duty to give reasons. All that s. 59 does is to deprive an aggrieved person of the benefit of the *audi alteram partem* rule. It has no effect upon other facets of the duty to accord procedural fairness, including the duty to give reasons.

[10] The State of Sabah has granted the appellant an Entry Permit despite having in its possession material, albeit outdated, that he was a person of low moral fibre. Since the existence of such unfavourable information did not prevent the grant of an Entry Permit, it is most unreasonable to rely upon the very same information to direct a cancellation. If poor morals was no bar to the grant of an Entry Permit, they cannot form the basis for a cancellation.

[11] The decision of the second respondent to direct a cancellation of the appellant's Entry Permit is not substantively fair. That cancellation is null and void. It follows that both the first and second appeals succeed and that *certiorari* must issue to remove and quash the cancellation of the appellant's Entry Permit.

[Appeal allowed; order accordingly.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Perayu adalah seorang warganegara Malaysia dan telah menetap di Negeri Sabah sejak tahun 1975 atas ihsan satu Pas Kerja. Pada tahun 1985 perayu telah diterimamasuk ke Badan Peguam Sabah dan sejak itu memulakan amalan undang-undang di sana. Walaupun tinggal begitu lama di Sabah, perayu bukan seorang penduduk tetap Sabah dan dengan itu tidak "dipunyai oleh Sabah" berdasarkan s. 71(1)(a) Akta Imigresen 1963 ('Akta'). Perayu berhasrat untuk meletakkan pemastautinannya di Sabah pada tahap yang lebih tetap dan

berikutnya mengambil langkah untuk memohon satu Pas Masuk. Ekoran itu, pada 27 Disember 1995, responden pertama mengeluarkan satu Pas Masuk kepada perayu, dan berikutannya, perayu dibenarkan tinggal di Sabah selama dua tahun. Adalah jelas bahawa, di akhir tempoh tersebut, mengikut s. 71(1)(a) Akta, perayu akan menjadi seorang yang "dipunyai oleh Sabah".

Perayu kedua, Pihak Berkuasa Kerajaan Negeri Sabah, sambil itu, berpendapat bahawa perayu adalah seorang yang berakhlak rendah dan bahawa kehadirannya di Sabah adalah 'prejudicial to the morality of Sabah'. Dengan yang demikian, menggunakan kuasa yang diberikan kepadanya oleh s. 65(1) Akta, responden kedua mengarahkan responden pertama supaya membatalkan Permit Masuk perayu. Begitulah, pada 12 November 1997, responden pertama telah membatalkan Permit Masuk perayu sekaligus memberi perayu tujuh hari untuk meninggalkan Sabah.

Perayu memulakan tindakan *ex parte* melalui usul pemula untuk kebenaran mengeluarkan *certiorari* untuk membatalkan keputusan responden pertama, dan kebenaran telah diberi oleh Suleiman Hashim H. Bagaimanapun, dalam memberikan kebenaran, hakim yang bijaksana enggan memerintah supaya kebenaran tersebut menjadi suatu penggantungan, atas alasan bahawa sesuatu perintah penggantungan, kerana sifatnya sebagai suatu injunksi, tidak boleh dikeluarkan berdasarkan s. 54(d) Akta Relif Tertentu 1950 serta s. 29(2) Akta Prosiding Kerajaan 1956. Perayu telah merayu terhadap keengganan ini.

Usul substantif perayu untuk perintah-perintah *certiorari* kemudiannya didengar oleh Ian Chin H di mana perayu berhujah, antara lain, bahawa responden pertama bertindak secara tidak sah ketika membatalkan Permit Masuk, oleh kerana beliau hanya boleh bertindak atau membatal permit di bawah s. 14 Akta tetapi sebaliknya bertindak menurut s. 65(1). Hakim yang bijaksana, sementara mengakui bahawa permohonan di hadapannya dikuasai oleh s. 14, dan bukan oleh s. 9(1)(c) sepertimana hujah Peguam Negeri, bagaimanapun menolak permohonan. Adalah pendapat yang arif hakim bahawa kajian semula kehakiman telah secara berkesannya dihapuskan oleh fasal penyingkiran dalam s. 59A Akta, dan bahawa, tindakan responden pertama, dalam konteks ss. 14 dan 65, tidak dicemari oleh apa-apa kesilapan undang-undang.

Fakta juga menunjukkan bahawa satu hujah lanjutan telah dibahaskan oleh perayu di hadapan yang arif hakim, iaitu, bahawa kes semasa ini bukan merupakan suatu kes yang bersangkutan dengan kepentingan awam, kepentingan negara atau keselamatan negara, dan dengan sebab itu, mahkamah berkewajipan untuk menilai dengan secara objektif segala fakta yang dibentang dihadapannya guna untuk menentukan samada suatu tribunal yang munasabah, jika berada dalam halkeadaan yang sama, akan mengambil keputusan

sebagaimana yang diambil oleh responden pertama, dan sebagai sokongan mengemukakan kes-kes *Rama Chandran lwn. Industrial Court of Malaysia, Kumpulan Perangsang Selangor Berhad lwn. Zaid Mohd Noh* dan *Harris Solid State Sdn Bhd lwn. Bruno Gentil s/o Pereira & Ors*. Hakim yang bijaksana bagaimanapun memutuskan bahawa kes-kes tersebut tidak bersangkutan dengan hak Negeri-Negeri di Malaysia Timur terhadap hal-ehwal imigresen, dan oleh itu, mengenepikan autoriti-autoriti berkenaan sebagai tidak relevan.

Akibatnya, perayu juga merayu terhadap keengganan hakim yang bijaksana mengeluarkan perintah-perintah *certiorari,* dan di hadapan yang arif hakim-hakim rayuan, timbul persoalan: (i) Samada hakim yang bijaksana silap bila enggan mengeluarkan perintah penggantungan di sini; (ii) Samada dalam halkeadaan yang wujud Mahkamah Tinggi tersingkir dari melaksanakan kuasa-kuasa kajian semula kehakimannya; (iii) Samada permohonan perayu dikawal oleh s. 9(1)(c) dan bukan s. 14 Akta, dan jika demikian, samada "morality" dalam s. 9(1)(c) bermaksud "public morality" dan bukannya akhlak peribadi seseorang; (iv) Samada sifat akhlak rendah boleh menjadi alasan bagi Pihak Berkuasa Negeri mengarahkan pembatalan satu Permit Masuk dan dengan itu melarang seseorang menjadi "belonging to Sabah" di bawah s. 71 Akta, dan walau apapun, samada keputusan membatalkan Permit Masuk perayu di sini secara substantifnya adil; dan (v) Samada hakim yang bijaksana silap kerana tidak mengeluarkan perintah *certiorari.*

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Adalah betul bagi Suleiman Hashim H. untuk memberi kebenaran walaupun perayu tidak menggunakan peruntukan dalam Akta di mana terdapat remedi rayuan kepada Menteri. Perayu hanya diberi tujuh hari untuk meninggalkan Sabah dan kehidupan beliau juga mungkin terjejas dengan seriusnya. Akta juga tidak memperuntukkan penggantungan sesuatu keputusan sementara menunggu rayuan kepada Menteri. Adalah jelas bahawa remedi rayuan tidaklah secekap *certiorari.*

[2] Hakim yang bijaksana, bagaimanapun, tersilap kerana menyamakan penggantungan dengan injunksi dalam lingkungan remedi undang-undang awam. Dalam konteks A. 53 k.1(5) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'), suatu perintah penggantungan akan menahan buat sementara waktu kesan sesuatu keputusan undang-undang awam sementara menunggu keputusan prosiding *certiorari* atau prohibition. Sebaliknya, suatu injunksi akan menahan atau mengarah satu pihak dalam prosiding dan dengan itu bertindak secara *in personam*. Ianya mengikut bahawa satu perintah penggantungan di sisi undang-undang bukanlah satu injunksi. Oleh yang demikian, kedua-dua s. 54(d) Akta

Relif Tertentu 1950 dan s. 29(2) Akta Prosiding Kerajaan 1956 tidak membatasi kuasa yang diberikan kepada Mahkamah Tinggi oleh A. 53 k. 1(5) KMT. Hakim telah silap kerana tidak membenarkan penggantungan.

[2a] Lagipun, s. 29(2) Akta Prosiding Kerajaan 1956 bercakap tentang "prosiding sivil", dan "prosiding sivil", mengikut s. 2 Akta tersebut, tidak merangkumi "such proceedings as would in England be brought on the Crown side of the Queen's Bench Division". Ianya tidak dinafikan bahawa apabila Akta Prosiding Kerajaan digubal, prosiding-prosiding yang dibawa ke "Crown side of the Queen's Bench Division" hanyalah permohonan untuk mendapatkan relif prerogatif seperti *certiorari*, prohibition, *quo warranto* dll. Oleh yang demikian, berdasarkan definisi, prosiding-prosiding berkenaan bukan "prosiding sivil" untuk maksud Akta Prosiding Kerajaan. Berikutan itu, s. 29 tidak terpakai kepada permohonan *certiorari* dan lain-lain relif prerogatif.

[3] Kajian semula kehakiman adalah satu ciri asas dan penting Perlembagaan dan, terkecuali kes-kes yang melibatkan keselamatan negara atau kepentingan negara di mana pertimbangan-pertimbangan khusus terpakai, tidak ada undang-undang yang diluluskan oleh Parlimen boleh menghapuskannya dengan begitu saja. Oleh yang demikian, s. 59A Akta sama sekali tidak boleh menyingkir Mahkamah Tinggi dari melaksanakan kuasa kajian semula kehakimannya untuk meneliti keesahan pelaksanaan kuasa-kuasa pentadbiran di bawah Akta samada dari segi prosedur mahupun dari segi substantifnya.

[3a] Sepertimana ekspresi "nyawa" dalam fasal 5(1) Perlembagaan, yang perlu diberikan maksud yang luas dan liberal, ungkapan "kebebasan diri" ('personal liberty') dalam fasal 8(1) mestilah diberikan tafsiran yang serupa. Ianya mengikut bahawa kebebasan seseorang yang tersinggung untuk mendapatkan relif di mahkamah, termasuk relif kajian semula kehakiman terhadap tindakan pentadbiran, adalah merupakan sebahagain dari hak-hak "kebebasan diri" seperti yang dijamin oleh s. 8(1) Perlembagaan persekutuan.

[4] Seksyen 14 Akta tidak terpakai kepada kes semasa kerana ianya merupakan peruntukan yang terpakai kepada pendatang secara umumnya. Kes semasa sebaliknya adalah dikuasai oleh s. 9(1)(c), yang merujuk secara khusus kepada kuasa responden pertama untuk membatal Permit Masuk yang dikeluarkan kepada orang-orang yang memasuki Malaysia atau mana-mana bahagiannya. Hakim yang bijaksana, oleh yang demikian, telah tersalah arah di sisi undang bilamana beliau gagal memberi pertimbangan kepada seksyen ini.

[4a] Menggunapakai kaedah pentafsiran *noscitur a sociis*, expresi "morality" dalam s. 9(1)(c) bermaksud "public morality" dan bukan "personal or private morality" seseorang. Oleh sebab itu, akhlak peribadi seseorang adalah satu pertimbangan yang tidak relevan bagi maksud pembatalan Permit Masuk seseorang individu di bawah s. 9(1)(c).

[5] Sementara Negeri-Negeri Malaysia Timur mempunyai hak dan keistimewaan tertentu yang diperuntukkan kepada mereka oleh Perlembagaan Persekutuan, terutama sekali yang bersangkutan dengan imigresen, mereka, seperti juga Kerajaan Persekutuan dan Kerajaan semua Negeri-Negeri di Malaysia Barat, adalah tertakluk kepada peruntukan-peruntukan Perlembagaan Persekutuan.

[5a] Bukanlah niat Parlimen untuk memberikan kepada Pihak Berkuasa Negeri di Malaysia Timur kuasa yang tidak terbatas untuk mengarahkan pembatalan sesuatu Permit Masuk. Sebagaimana yang terserlah dari ungkapan pembukaan s. 65(1), tujuan badan perundangan menunjukkan kepada sebaliknya. Ungkapan tersebut yang berbunyi "In exercising his powers under Parts I to VI" merujuk kepada seksyen-seksyen dalam enam Bahagian Akta berkenaan, yang mana salah satu darinya ialah s. 9(1)(c) yang jelas membatas kuasa pembatalan. Ianya mengikut bahawa, dalam konteks sebuah Negeri Malaysia Timur, pra-syarat statutori yang termaktub dalam s. 9(10(c) *mutatis mutandis* menguasai pembatalan sesuatu Permit Masuk oleh Pihak Berkuasa Negeri. Oleh yang demikian, responden kedua hanya boleh memberi arahan kepada responden pertama untuk membatal Permit Masuk perayu setelah mereka sendiri, secara objektifnya, berpuashati bahawa memang wujud alasan sepertimana yang tertera dalam s. 9(1)(c).

[6] Ianya jelas di sini bahawa akhlak peribadi perayu (yang dikatakan buruk) menjadi alasan bagi arahan untuk membatalkan Permit Masuk. Pertimbangan sedemikian bukan merupakan pertimbangan yang dibenarkan oleh s. 9(1)(c), dan kerana itu, keputusan untuk mebatalkan Permit Masuk perayu tidaklah dibuat mengikut lunas undang-undang. Ini bukanlah suatu kes di mana kehadiran seseorang itu memprejudiskan 'morality' awam, yang mana merupakan pertimbangan yang relevan di sisi Akta bagi membatalkan sesuatu Permit Masuk.

[7] Mungkin benar bahawa s. 59 berhasrat untuk mengenepikan cabang *audi alteram partem* dalam kaedah keadilan asasi dalam halkeadaan yang digambarkan oleh seksyen tersebut. Namun begitu, kaedah keadilan asasi adalah merupakan satu konsep yang fleksibel di mana ruangnya tidak pernah tertutup. Lagipun kaedah-kaedah tersebut hanyalah menjadi sebahagian dari doktrin yang lebih luas, iaitu kewajipan untuk bertindak

adil. Bagaimanapun, fasal 8(1) Perlembagaan Persekutuan meletakkan kewajipan ke atas pembuat keputusan awam untuk berlaku adil. Responden kedua juga tiada beza dan mesti bertindak adil dalam melaksanakan kuasa-kuasa yang diberikan kepadanya oleh Akta.

[8] Sebagaimana yang ditunjuk oleh *Rama Chandran lwn. The Industrial Court of Malaysia, inter alia,* kajian semula kehakiman bukan lagi semata-mata berkait dengan proses membuat keputusan, tetapi merangkumi keputusan itu sendiri. Kewajipan berlaku adil kini mengandungi dua cabang, iaitu keadilan prosedur dan keadilan substantif. Ianya mengikut bahawa sesuatu keputusan itu boleh dibatal atas alasan bertentangan dengan prinsip substantif.

[8a] Samada keputusan untuk membatal Permit Masuk perayu adil secara substantifnya adalah soalan yang langsung tidak ditanya oleh yang arif hakim. Dengan kegagalan untuk menimbang persoalan tersebut, yang arif hakim kelihatan agak tersalah faham akan tugasnya dalam prosiding kehakiman. Yang arif hakim juga tidak menilai keterangan afidavit yang dikemukakan di hadapannya dan ini adalah satu tiada arahan yang serius pada pihaknya.

[8b] Walaupun yang arif hakim ada merujuk kepada *Rama Chandran* beliau gagal mengambil perhatian secukupnya akan limpahan jurisprudens undang-undang awam yang mengalir dari keputusan majoriti kes tersebut. Yang arif hakim, dengan melihat kepada *Rama Chandran* dan kes-kes yang lain itu sebagai keputusan yang bergantung kepada fakta kes-kes berkenaan, telah mengambil pendekatan yang terlalu sempit. Adalah jelas bahawa kes-kes ini telah membuahkan prinsip undang-undang awam yang penting dan adalah autoriti bagi kenyataan bahawa kajian semula kehakiman terhadap suatu keputusan undang-undang awam tidak terhad kepada keadilan prosedur tetapi meliputi keadilan substantif.

[8c] Yang arif hakim juga telah memakai pendekatan yang sangat sempit apabila beliau membataskan dirinya kepada persoalan sempit yang dibangkitkan oleh peguam perayu, iaitu bahawa responden pertama hanya boleh bertindak di bawah s. 14 Akta, dan kemudiannya mencari salah arahan yang spesifik dalam konteks ss. 14 dan 65 Akta. Suatu kesilapan undang-undang dalam konteks undang-undang awam adalah satu konsep yang luas dan tidak terhad hanya kepada salah-tafsiran oleh pembuat keputusan. Ianya aklan terserlah apabila pembuat keputusan bertanyakan dirinya soalan yang salah, atau mengambilkira pertimbangan yang tidak relevan atau tidak mengambilkira pertimbangan yang relevan (iaitu kesilapan *Anisminic*) atau jika ia menyalah tafsir terma mana-mana statut yang relevan, ataupun tersalah pakai atau tersalah nyata suatu prinsip undang-undang am.

[8d] Hakim yang bijaksana, malahan, sama sekali tidak nampak isu yang dibangkitkan dengan panjang lebar di hadapannya oleh peguam perayu. Berbeza dari *Rama Chandran* dan *Harris Solid State*, ini bukanlah suatu kes di mana mahkamah diminta untuk mengganti keputusan responden kedua dengan satu keputusan mahkamah sendiri. Sekiranya permintaan sedemikian dibuat, maka barulah pertimbangan kepentingan awam sepertimana yang dirujuk oleh hakim menjadi relevan. Dalam keadaan permohonan yang wujud di hadapannya, kepentingan awam adalah sama sekali tidak relevan. Hakim seharusnya tidak memperdulikan faktor tersebut.

[9] Sementara hakim yang bijaksana betul dalam pendapatnya bahawa responden pertama tidak perlu mengemukakan alasan bagi pembatalan Permit Masuk perayu, sebab-sebab yang beliau berikan bagi pendapatnya itu adalah salah. Kenyataannya ialah, kedua-dua s. 59 dan s. 59A tidak menyingkirkan tanggungjawab untuk memberi sebab. Apa yang dibuat oleh s. 59 hanyalah menidakkan kaedah *audi alteram partem* kepada seseorang yang tersinggung.

[10] Pihak Negeri Sabah telah memberi Permit Masuk kepada perayu walaupun mengetahui bahawa beliau seorang yang berakhlak rendah. Oleh kerana kewujudan laporan kurang baik tersebut tidak menghalang pemberian Permit Masuk, ianya sangat tidak munasabah untuk bergantung kepadanya bagi mengarahkan pembatalan. Jika akhlak rendah tidak menghalang pemberian Permit Masuk, ia tidak boleh menjadi alasan untuk membatalkannya.

[11] Keputusan responden kedua mengarahkan pembatalan Permit Masuk perayu adalah secara substantifnya tidak adil. Pembatalan tersebut adalah tak sah dan batal. Kedua-dua rayuan pertama dan kedua dengan itu dibenarkan dan *certiorari* juga dibenarkan bagi mengalih dan membatal pembatalan Permit Masuk perayu.

[Rayuan dibenarkan; perintah sekadarnya.]

Cases referred to:

Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors [1996] 4 CLJ 747 ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan [1997] 4 CLJ 665 ***(not foll)***

Kanda v. Government of the Federation of Malaya [1962] MLJ 169 ***(foll)***

Kharak Singh v. State of Uttar Pradesh AIR [1963] SC 1295 ***(foll)***

Kulasingam & Anor v. Commissioner of Lands, Federal Territory & Ors [1982] 1 CLJ 65 ***(refd)***

Kumpulan Perangsang Selangor Bhd v. Zaid Hj Mohd Noh [1997] 2 CLJ 11 ***(refd)***

Maneka Gandhi v. Union of India AIR [1978] SC 597 ***(foll)***

Merdeka University v. Government of Malaysia [1982] 2 MLJ 243 ***(refd)***
Minerva Mills Ltd v. Union of India AIR [1980] SC 1789 ***(foll)***
Mohamed Nordin Johan v. Attorney-General, Malaysia [1983] 1 MLJ 68 ***(cit)***
Padfield v. Minister of Agriculture, Fisheries & Food [1968] AC 997 ***(refd)***
Pahang South Omnibus Co Bhd v. Minister of Labour and Manpower & Anor [1981] 2 MLJ 199 ***(refd)***
PMNT Ramasamy Chetty v. Syed Alsagoff 7 FMSLR 93 ***(refd)***
Public Prosecutor v. Dato Yap Peng [1987] 1 CLJ 550 ***(refd)***
R v. Lord Chancellor, ex p Witham [1997] 2 All ER 779 ***(refd)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(refd)***
Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & ors [1995] 1 CLJ 619 ***(refd)***
Re Tan Sri Raja Khalid Raja Harun [1988] 1 CLJ 39 ***(refd)***
Richardson v. Austin [1911] 12 CLR 463 ***(refd)***
Rohit Pulp & Paper Mills Ltd v. Collector of Central Excise, Baroda AIR [1991] SC 754 ***(refd)***
Sampath Kumar v. Union of India AIR [1987] SC 386 ***(foll)***
Shree Chamundi Mopeds Ltd v. Church of South Indian Trust Association, Madras AIR [1992] SC 1439 ***(foll)***
Sri Venkataramana Devaru v. State of Mysore [1958] SCR 895 ***(refd)***
Sykt Kenderaan Melayu Kelantan Bhd v. Transport Workers' Union [1995] 2 CLJ 748 ***(foll)***
Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 ***(foll)***
Tasmania v. The Commonwealth [1904] 1 CLR 329 ***(foll)***
The State of Bombay & Ors v. The Hospital Mazdoor Sabha & Ors AIR [1960] SC 610 ***(foll)***
Theresa Lim Chin Chin & Ors v. Inspector General of Police [1988] 1 MLJ 293 ***(cit)***
Unni Krishnan v. State of Andhra Pradesh [1993] 1 SCC 645 ***(foll)***

Legislation referred to:

Government Proceedings Act 1956, ss. 2, 29(2)
Federal Constitution, arts. 5(1), 8(1), 121(1)
Immigration Act 1963, ss. 9(1)(c), 14, 59, 59A, 65(1)(c), 66, 71(1)(a),
Immigration Regulations 1963, reg. 16
Rules of the High Court 1980, O. 53 r. 1(5)
Specific Relief Act 1950, s. 54(d)
Universities and University Colleges Act 1971, s. 6

Other sources referred to:

Administrative Law of Malaysia & Singapore, MP Jain, 3rd edn, p 428
Jowitt's Dictionary of English Law, 2nd edn, vol 2, p 1701

For the appellant - Muhammad Shafee Abdullah (K Rajasegaran with him); M/s Sugumar & Co
For the 1st respondent - Dato' Zaiton Zawiyah Puteh SFC
For the 2nd respondent - Datuk Stephen Foo Kiat Shin SAG (Athmat Hassan with him)

[Appeal from High Court, Kota Kinabalu; Originating Motion No: K-25-29-1997]

Reported by WA Sharif

JUDGMENT

Gopal Sri Ram JCA:

Introduction

There are two appeals before us. The first is Civil Appeal No. 202/97 which we shall for convenience refer to as "the first appeal". It is directed against the refusal by Ian Chin J, sitting in the High Court at Kota Kinabalu, to grant orders of *certiorari* sought by the appellant. The other is Civil Appeal No. 669/97 ("the second appeal") which arises out of an earlier decision in the same proceedings whereby the High Court, when granting leave to issue *certiorari*, refused to order that such leave do operate as a stay. Although we will say something more about the correctness of the decision that forms the subject matter of the second appeal later in this judgment, it suffices for the present to note that a resolution of the first appeal in one way or another will render the second appeal academic. We are therefore concerned in the main with the first appeal. Counsel on all sides were in agreement that this is the correct way in which to approach these appeals.

When these appeals were called on for hearing before us on 30 March 1998, counsel for the appellant informed us that he had two motions in the first appeal. The first of these motions was for a stay pending appeal. It was unopposed. We therefore granted the stay sought by the appellant pending the disposal of the first appeal. We also ordered that the costs of the first motion follow the outcome of the first appeal.

By the second motion the appellant sought to re-amend the amended substantive motion filed before the High Court by seeking *certiorari* to quash the direction issued by the second respondent. The first respondent did not oppose this application. But the learned State Attorney General for Sabah did. After hearing arguments upon the second motion we came to the conclusion that it ought not to succeed.

In our view, having regard to the substratum of the facts of this case, the amendment was unnecessary. Further, to allow the amendment at this late stage would have resulted in much procedural difficulty. Leave to apply for the fresh relief is required. We have no original jurisdiction to grant such leave and hear the substantive motion for *certiorari* unless leave has been refused by the High Court in the first instance. See *Mohamed Nordin bin Johan v. Attorney-General, Malaysia* [1983] 1 MLJ 68. Lastly, the relief now sought by the re-amendment could have been applied for when the substantive motion was amended before the learned judge in the High Court. Taking into account all relevant matters, we exercised discretion against the appellant and dismissed the second motion. We also ordered the appellant to bear the taxed costs of this motion in any event.

With that we now turn to consider the merits of the first appeal.

Background

The appellant is a citizen of the Federation of Malaysia. Although a West Malaysian, he has been in Sabah since 1975. In 1985 he was admitted as an advocate of the Bar of Sabah. He has been practising law in that State ever since. He does not, however, belong to Sabah because he is not as yet a permanent resident of that State. To acquire that status, he must fulfill certain requirements under the Immigration Act 1963 ("the Act") in so far as it applies to the East Malaysian States. The relevant provision is s. 71(1)(a) of the Act. It reads:

> 71(1) For purposes of section 66, a citizen shall be treated as belonging to an East Malaysian State if –
>
> (a) he is or has within the preceding two years been a permanent resident in the East Malaysian State.

As will be seen in a moment, it was important to the appellant that he, in the words of the Act, belongs to Sabah. It would mean that he can enter the State freely and reside there permanently. Otherwise he would require a Permit or Pass under s. 66 of the Act to enter Sabah.

Initially, the appellant resided in Sabah pursuant to a work pass issued under reg. 16 of the Immigration Regulations 1963. It was not permanent in nature because the pass could be revoked at any time by the respondents. It placed the appellant in an uncertain position, especially having regard to his profession. It was therefore important for the appellant to place his status on a firm footing. He tried to obtain an entry pass to enable him to reside in Sabah. Eventually, on 27 December 1995, the first respondent granted the

appellant an entry pass. It was endorsed on the appellant's passport. It was valid for two years. It meant that he could reside in Sabah for two years. At the end of that period he would, according to the Act, be a person "belonging" to Sabah.

However, on 12 November 1997, that is to say, about six weeks before the end of the two year period, the appellant was served with a Notice of Cancellation of Entry Permit dated the previous day. It is an important document. We shall therefore reproduce the material portion of it in full. It reads:

NOTICE OF CANCELLATION OF ENTRY PERMIT
Section 65 (1) (c) Immigration Act 1959/63
(Amended 1997)

To: Sugumar Balakrishnan of Kota Kinabalu

Whereas you, Sugumar Balakrishnan I/C No. 4548121, has been granted entry permit to reside in Sabah vide Ref. No. CIM/EP/21072 issued on 27 December 1995 at Kota Kinabalu.

NOW, KNOW YOU, That I, Abdullah Sani Bin Sulaiman, State Director Of Immigration, Sabah by virtue of the directive by the State Authority of Sabah under section 65(1) (c) of the Immigration Act, 1959/63 do hereby forthwith cancel the entry permit issued to you and your presence in the state of Sabah is declared unlawful.

Upon receiving this order you are summoned to appear at the Immigration Office 6th floor, Wisma Dang Bandang, Kota Kinabalu, Sabah on or before 18 November 1997 for further action.

Signed
(ABDULLAH SANI SULAIMAN)
DIRECTOR OF IMMIGRATION,
STATE OF SABAH
Dated this: 11 November 1997

On the same day, that is, 12 November 1997, the first respondent (the Director of Immigration, Sabah) issued the appellant a special pass valid for seven days. At the end of that period the appellant would have had to leave Sabah. Thereafter, the appellant acted with commendable speed. On 14 November 1997, he took out an *ex parte* originating motion for leave to issue *certiorari* to quash the first respondent's act of cancelling the Entry Pass. The second respondent (the State authority of Sabah) was not a party to that application.

The appellant's motion for leave came up on 17 November 1997 before Suleiman Hashim J, who, acting with equally commendable speed, delivered his written judgment on the same day. The learned judge, after citing numerous authorities, came to the conclusion that leave to apply for *certiorari* ought to be granted despite the appellant's failure to have resort to those provisions of the Act under which the remedy of an appeal to the Minister was available.

We are in agreement with the reasons given by Suleiman Hashim J, for granting the appellant leave. In the circumstances of this case, the remedy of an appeal was, for obvious reasons, certainly not equally efficacious as *certiorari.* The appellant was given a mere seven days to leave Sabah. The time afforded him was hardly sufficient for him to make arrangements in respect of the practice he had built up over many years. Serious injury to the appellant's livelihood was imminent. An appeal to the Minister would not have been decided upon within the seven day period afforded the appellant. Further, the Act does not provide for a stay of a decision pending appeal to the Minister. It meant that the appellant would have to remove himself from the State of Sabah while awaiting the outcome of his appeal. As opposed to this, there is power in a court granting leave to apply for *certiorari* to direct that such leave do operate as a stay. Accordingly, the learned judge was entirely correct in granting leave.

The Order Refusing A Stay

Now, although he granted the appellant leave to apply for *certiorari,* the learned judge declined to stay the effect of the cancellation of the Entry Pass. This refusal, as we have already observed, forms the subject matter of the second appeal. After having given notice of appeal against the judge's refusal to grant a stay, the appellant urgently moved this court on 19 November 1997 for a stay. It was granted him pending the outcome of his substantive motion for *certiorari.*

The power to direct a stay is to be found in O. 53 r. 1(5) of the Rules of the High Court 1980. It reads:

> The grant of leave under this rule to apply for an order of prohibition or an order of *certiorari* shall, if the court or judge so directs, operate as a stay of the proceedings in question until the determination of the application or until the court or Judge otherwise orders.

The learned judge found himself unable to direct a stay because he found that that would amount to granting an injunction in violation of s. 54(d) of the Specific Relief Act 1950 and s. 29(2) of the Government Proceedings Act 1956. These two provisions read as follows:

54. An injunction cannot be granted – *a*

(d) to interfere with the public duties of any department of Government in Malaysia or with the sovereign acts of a foreign Government.

29(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government. *b*

With respect, we are of the view that the learned judge fell into error in equating a stay with an injunction in the environment of public law remedies. In the context of O. 53 r. 1(5), an order of stay has the effect of temporarily suspending the effect of a public law decision pending the outcome of *certiorari* or prohibition proceedings brought to challenge the validity of the particular decision. *c*

Jowitt's Dictionary of English Law, 2nd Edn, vol. 2, at p. 1701 expresses the view that "a stay of proceedings in an action is a suspension of them." With respect, this definition is of little assistance in a public law case such as the present. We, however, find the following passage in the judgment of S.C. Aggarwal J, in *Shree Chamundi Mopeds Ltd. v. Church of South Indian Trust Association, Madras* AIR [1992] SC 1439, 1444 to be more relevant: *d* *e*

> While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. *f*

By contradistinction, an injunction is directed at a party to a proceeding restraining him from doing, or requiring him to perform, a particular act. Put another way, an injunction acts *in personam*, a stay does not. It follows that as a matter of law, an order for stay is not an injunction. Both the statutory provisions relied upon by the learned judge do not therefore curtail, in any way, the power conferred upon a High Court by O. 53 r. 1(5). *g*

There is one other matter which in our view calls for comment. It has to do with s. 29(2) of the Government Proceedings Act. That section speaks of "civil proceedings" which expression is defined by s. 2 of that Act as follows: *h*

i

> 'civil proceedings' means any proceeding whatsoever of a civil nature before a court and includes proceedings for the recovery of fines and penalties and an application at any stage of a proceeding, but does not include proceedings under Chapter VIII of the Specific Relief Act 1950, or **such proceedings as would in England be brought on the Crown side of the Queen's Bench Division.** (Emphasis added.)

It is trite that when the Government Proceedings Act was enacted in 1956, the only proceedings that were brought on the Crown side of the Queens Bench Division were applications seeking prerogative relief, such as *certiorari*, prohibition, *quo warranto* etc. By definition, therefore, such proceedings are not "civil proceedings" for purposes of the Government Proceedings Act. Consequently, s. 29 has no application to applications for *certiorari* and other prerogative relief.

What we have said thus far provide a complete answer to the reasons advanced by the learned judge for refusing a stay. In the premises, there was no impediment to the learned judge granting a stay of the first respondent's act of cancelling the appellant's Entry Permit pending the disposal of the substantive motion for orders of *certiorari*. Accordingly, the judge was plainly wrong in not granting the stay sought by the appellant.

The Order Refusing Certiorari

Following the grant of leave by Suleiman Hashim J, and the order for a stay by this court, the appellant's substantive motion for orders of *certiorari* came on for hearing before Ian Chin J. In the meantime, the second respondent was added as a party to the proceedings. After a lengthy hearing, the learned judge dismissed the appellant's application with costs.

The grounds upon which the judge proceeded to determine the matter against the appellant appear sufficiently in his carefully considered written judgment in which he surveyed some of the leading cases upon the subject. His conclusions may be summarised as follows. First, he found that the ouster clause contained in s. 59A of the Act applied to acts done, or decisions made, by the first respondent. Second, he agreed with the submission advanced on the appellant's behalf that the ouster clause would not protect decisions arrived at in consequence of an error of law. Third, he held that there had been no error of law in the cancellation of the appellant's Entry Permit. Fourth, he found any right to a hearing which the appellant may have had was excluded by the Act. Fifthly, he held that the respondents were not under a duty to give any reasons to the appellant for cancelling his Entry Permit.

Before us, the appellant levelled a wide ranging criticism of the reasons advanced by the learned judge for refusing *certiorari*. We find it unnecessary to deal with all the arguments addressed to us. Suffice that we deal with two matters which, in our view, are sufficient to dispose of the first appeal. The first is the learned judge's conclusion that there had been no error of law. The second concerns the duty upon a public decision-maker to act fairly and the application of that doctrine to the facts of the present case. However, before we enter upon a discussion of these matters, we find it necessary to deal with other points relevant to the case.

The Ouster

We are in agreement with the views expressed by the learned judge upon the effect of s. 59A of the Act and its applicability to the first respondent. However, having regard to the general importance of the point and the way in which the section is constructed, we consider it desirable to re-state the law upon the matter.

Section 59A reads as follows:

> 59A. (1) There shall be no judicial review in any court of any act done or any decision made by the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, under this Act except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision.
>
> (2) In this section, "judicial review" includes proceedings instituted by way of –
>
> (a) an application for any of the prerogative orders of *mandamus*, prohibition and *certiorari;*
>
> (b) an application for a declaration or an injunction;
>
> (c) any writ of *habeas corpus;* or
>
> (d) any other suit or action relating to or arising out of any act done or any decision made in pursuance of any power conferred upon the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, by any provisions of this Act.

It may be difficult to envision any wider provision than this as constituting an attempt to prevent judicial review of administrative acts and decisions. Nevertheless, for reasons we will provide in a moment, s. 59A cannot and does not preclude the High Court from exercising its powers of judicial review to examine the validity of the exercise of administrative powers conferred by the Act both on substantive as well as procedural grounds.

The legislative intent in enacting privative clauses is to place certain public law acts and decisions completely beyond curial review. The principle of statutory construction which enables ouster clauses to protect only those acts and decisions of public decision-makers which are done or made in accordance with law is based upon, and is consonant with, the constitutional right of a person to approach the judicial arm of Government to seek redress for alleged wrongs. That the right is recognised even in England; a jurisdiction which has no written constitution; is demonstrated by the decision of the Divisional Court in *R. v. Lord Chancellor, ex parte Witham* [1997] 2 All ER 779. We find instructive two passages from the judgment of Laws J, delivered in that case. The first of these is at pp. 783-4 of the report:

> The common law does not generally speak in the language of constitutional rights, for the good reason that in the absence of any sovereign text, a written constitution which is logically and legally prior to the power of legislature, executive and judiciary alike, there is on the face of it no hierarchy of rights such that any one of them is more entrenched by the law than any other. And if the concept of a constitutional right is to have any meaning, it must surely sound in the protection which the law affords to it. Where a written constitution guarantees a right, there is no conceptual difficulty. The state authorities must give way to it, save to the extent that the constitution allows them to deny it. There may of course be other difficulties, such as whether on the constitution's true interpretation the right claimed exists at all. Even a superficial acquaintance with the jurisprudence of the Supreme Court of the United States shows that such problems may be acute. But they are not in the same category as the question: do we have constitutional rights at all?
>
> In the unwritten legal order of the British State, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of a constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the state save by specific provision in an Act of Parliament, or by regulations whose vires in main legislation specifically confers the power to abrogate. General words will not suffice. And any such rights will be creatures of the common law, since their existence would not be the consequence of the democratic political process but would be logically prior to it.

The second passage appears at p. 787 of the report where, after a review of several leading authorities upon the subject, the same learned judge said:

> It seems to me, from all the authorities to which I have referred, that the common law has clearly given special weight to the citizen's right of access to the courts. It has been described as a constitutional right, though the cases do not explain what that means. In this whole argument, nothing to my mind has been shown to displace the proposition that the executive cannot in law abrogate the right of access to justice, unless it is specifically so permitted by

> Parliament; and this is the meaning of the constitutional right. But I must explain, as I have indicated I would, what in my view the law requires by such a permission. A statute may give the permission expressly; in that case it would provide in terms that in defined circumstances the citizen may not enter the court door. In *Ex p Leech* [1993] 4 All ER 539, [1994] QB 198 the Court of Appeal accepted, as in its view the ratio of their Lordships' decision in *Raymond v. Honey* [1982] 1 All ER 756, [1983] 1 AC 1 vouchsafed, that it could also be done by necessary implication. However, for my part, I find great difficulty in conceiving a form of words capable of making it plain beyond doubt to the statute's reader that the provision in question prevents him from going to court (for that is what would be required), save in a case where that is expressly stated.

It is thus clear that the English Parliament may by express words limit or altogether preclude any person from going to court. The question then arises whether our Parliament is similarly empowered. After careful reflection we have arrived at the conclusion that that question should receive a negative response. Our reasons for taking this view now follow.

Unlike England, Malaysia has a written constitution the basic framework of which has been fashioned in language that upholds the Rule of Law. The fundamental guarantees that all persons are equal before the law and have equal protection of it (art. 8(1)) and that no person shall be deprived of life or personal liberty save in accordance with law (art. 5(1)) clearly demonstrate that ours is not a Government of mere humans but of laws. The wide reach of these two articles, and in particular the brooding omnipresence (to borrow the language of Bhagwati J, in *Maneka Gandhi v. Union of India* AIR [1978] SC 597) of art. 8(1) has already been recognised by our courts. See, *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor.* [1996] 1 MLJ 261; *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan* [1996] 1 MLJ 481; *R Rama Chandran v. The Industrial Court of Malaysia & Anor.* [1997] 1 MLJ 145. These cases have held that the expression "life" in art. 5(1) is not limited to mere existence but is a wide concept that must receive a broad and liberal interpretation.

In our judgment the words "personal liberty" in art. 5(1) should be similarly interpreted. Any other approach to construction will necessarily produce an incongruous and absurd result. For, "life" and "personal liberty" are both equally dynamic concepts and should be treated in like fashion.

The Indian Supreme Court has, in several cases, held that the expression "personal liberty" appearing in art. 21 of the Indian Constitution is of the widest amplitude and should receive an expanded meaning. See, for example, *Kharak Singh v. State of Uttar Pradesh* AIR [1963] SC 1295 and *Unni Krishnan v. State of Andhra Pradesh* [1993] 1 SCC 645.

In *Kharak Singh (ibid),* Ayyangar J, said (at p. 1302) that the expression "personal liberty":

> is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Art. 19 (1). In other words, while Art. 19 (1) deals with particular species or attributes of that freedom, 'personal liberty' in Art. 21 takes in and comprises the residue.

The Federal Constitution has entrusted to an independent judiciary the task of interpreting the supreme law and, indeed, all laws enacted by the legislative arm of Government. Hence it is to the courts that a citizen must turn to enforce rights conferred by the Federal Constitution or other written law or existing at common law. This is a cardinal principle of constitutional law and has been stated in a number of cases. We will not go through all of them here. But we think it useful to quote from two authorities.

In *Minerva Mills Ltd. v. Union of India* AIR [1980] SC 1789, Bhagwati J, (later CJ) said (at p. 1825):

> It is a fundamental principle of our constitutional scheme, and I have pointed this out in the preceding paragraph, that every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power. But then the question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the State and whether such limits are transgressed or exceeded. Now there are three main departments of the State amongst which the powers of Government are divided; the Executive, the legislature and the Judiciary. Under our Constitution we have no rigid separation of powers as in the United States of America, but there is a broad demarcation, though, having regard to the complex nature of governmental functions, certain degree of overlapping is inevitable. The reason for this broad separation of powers is that 'the concentration of powers in any one organ may' to quote the words of Chandrachud, J (as he then was) in *Smt. Indira Gandhi's* case (AIR 1975 SC 2299) *(supra)* 'by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic Government to which we are pledged.' Take for example, a case where the executive which is in charge of administration acts to the prejudice of a citizen and a question arises as to what are the powers of the executive and whether the executive has acted within the scope of its powers. Such a question obviously cannot be left to the executive to decide and for two very good reasons. First, the decision of the question would depend upon the interpretation of the Constitution and the laws and this would pre-eminently be a matter fit to be decided by the judiciary, because it is the judiciary which alone would be possessed of expertise in this field and secondly, the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the

executive to determine the legality of its own action. So also if the legislature makes a law and a dispute arises whether in making the law the legislature has acted outside the area of its legislative competence or the law is violative of the fundamental rights or of any other provisions of the Constitution, its resolution cannot, for the same reasons, be left to the determination of the legislature. The Constitution has, therefore, created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. It is the solemn duty of the judiciary under the Constitution to keep the different organs of the State such as the executive and the legislature within the limits of the power conferred upon them by the Constitution.

In *Sampath Kumar v. Union of India* AIR [1987] SC 386 388, Bhagwati CJ explained the effect of the decision in *Minerva Mills (ibid)* as follows:

It is now well-settled as a result of the decision of this court in *Minerva Mills Ltd. v. Union of India* [1981] 1 SCR 206: (AIR 1980 SC 1789) that *judicial review is a basic and essential feature of the Constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away*. If the power of judicial review is abrogated or taken away the Constitution will cease to be what it is. It is a fundamental principle of our constitutional scheme that every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power. It is a limited Government which we have under the Constitution and both the executive and the legislature have to act within the limits of the power conferred upon them under the Constitution. Now a question may arise as to what are the powers of the Executive and whether the Executive has acted within the scope of its power. Such a question obviously cannot be left to the Executive to decide and for two very good reasons. First the decision of the question would depend upon the interpretation of the Constitution and the laws and this would pre-eminently be a matter fit be decided by the judiciary, because it is the judiciary which alone would be possessed of expertise in this field and secondly, the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action. So also if the legislature makes a law and a dispute arises whether in making the law, the legislature has acted outside the area of its legislative competence or the law is violative of the fundamental rights or of any other provisions of the Constitution, its resolution cannot, for the same reasons, be left to the determination of the legislature. The Constitution has, therefore created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. The judiciary is constituted the ultimate interpreter of the Constitution and to it is assigned the delicate task of determining what is the extent and scope of the power conferred on each branch of Government, what are the limits on the

> exercise of such power under the Constitution and whether any action of any branch transgresses such limits. It is also a basic principle of the Rule of Law which permeates every provision of the Constitution and which forms its very core and essence that **the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but also be in accordance with law** and it is the judiciary which has to ensure that the law is observed and there is compliance with the requirements of law on the part of the executive and other authorities. This function is discharged by the judiciary by exercise of the power of judicial review which is a most potent weapon in the hands of the judiciary for maintenance of the Rule of Law. **The power of judicial review is an integral part of our constitutional system** and without it, there will be no Government of laws and the Rule of Law would become a teasing illusion and a promise of unreality. (Emphasis added.)

The views expressed in the foregoing cases are not only entitled to great weight but may be safely adopted by our courts. Apart from being plain common-sense, they were made in respect of a written constitution the basic fabric of which resembles that of our Federal Constitution. In saying this, we do not overlook the amendment to art. 121(1) of the Federal Constitution whereby the words "judicial power of the Federation" were deleted on 10 June 1988 by Act A704. However, in accordance with well-established principles of constitutional interpretation, the deletion does not have the effect of taking away the judicial power from the High Courts.

The Constitution of Sri Lanka (formerly Ceylon) does not even mention the expression judicial power. Yet, upon high authority it has been held that despite the omission, the provisions in that document

> "manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature. (per Lord Pearce in *Liyanage v. The Queen* [1967] 1 AC 259, 287.

The Indian Constitution also does not make mention of judicial power being vested in the judiciary. Yet, the same position obtains there as in Sri Lanka. See, *Minerva Mills Ltd. v. Union of India (ibid)*. Like the Constitutions of Sri Lanka and India, the Federal Constitution preserves the separation of powers between the three arms of Government and evinces no intention that the judicial power of the Federation shall be passed to or shared with the

Executive or the Legislature. It follows that the judicial power of the Federation remains where it has always been, namely, with the judiciary.

Based upon what we have said thus far, we are of the view that the liberty of an aggrieved person to go to court and seek relief, including judicial review of administrative action, is one of the many facets of the personal liberty guaranteed by art. 5(1) of the Federal Constitution. Were it otherwise, the protection afforded by arts. 5(1) and 8(1) of the Federal Constitution will be illusory and the language of the supreme law no more than high sounding words of no practical significance.

The fundamental liberty of free access to an independent judiciary to obtain redress is apparently inconsistent with a provision in a statute that seeks to preclude that right by ousting the power of judicial review. This apparent inconsistency is resolved by permitting an ouster clause in a statute to immunize from judicial review only those administrative acts and decisions that are not infected by an error of law. Such an approach is in accordance with the well-established principle of legislative interpretation known as the rule of harmonious construction whereby the court, instead of striking down a statutory provision altogether as being unconstitutional, prefers to permit the impugned provision to operate in harmony with the Constitution. (see *Tasmania v. The Commonwealth* [1904] 1 CLR 329, 357; *Sri Venkataramana Devaru v. State of Mysore* [1958] SCR 895, 918).

So far as immunization of acts and decisions under the Act are concerned, we would merely repeat what was said in one of the judgments delivered by this court in *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers' Union* [1995] 2 MLJ 317, at p. 340:

> An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction.
>
> ...
>
> Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunized from judicial review by an ouster clause however widely drafted.

We must, however, enter a cautionary note before leaving the topic under present discussion. Nothing we have said thus far is to be taken as affecting cases that involve either national security or national interest. It is obvious

that special consideration must be given to those cases as a matter of judicial policy (see, for example, *Theresa Lim Chin Chin & Ors v. Inspector General of Police* [1988] 1 MLJ 293). In such cases, the court declines to intervene save, perhaps, on the limited procedural ground excepted by s. 59A because the subject matter in respect of which judicial review is sought is one that is best left to the Executive arm of Government to deal with according to the exigencies of the particular case and based upon information that is exclusively available to it. For reasons that will become apparent later, the present instance is one that does not evidentially fall within these special categories of cases.

Some Relevant Sections Of The Act

In order to properly appreciate the submissions made in this appeal it is necessary to refer to and deal with certain provisions of the Act cited to us during argument. They are as follows.

First, s. 9(1)(c) which reads:

> 9(1) Notwithstanding anything contained in this Act or in any subsidiary legislation made under this Act, the Director General may –
>
> (a) ...
>
> (b) ...
>
> (c) cancel any Permit at any time by writing under his hand, if he is satisfied that the presence in, or entry into, Malaysia of the holder of any Permit is, or would be, prejudicial to public order, public security, public health or morality in Malaysia or any part thereof.

There are two comments we would make upon this provision.

First, it is noteworthy that the section employs, in para. (c) the words "if he is satisfied" to predicate the exercise of the power of cancellation. Upon well-established authority, the satisfaction to which the section refers is objective and not subjective.

In *Merdeka University v. Government of Malaysia* [1982] 2 MLJ 243, it became necessary for the former Federal Court to consider a similar formula appearing in s. 6 of the Universities and University Colleges Act 1971. Suffian LP, who delivered the judgment of the court said (at p. 246):

> [A]dministrative law has since so far advanced such that today such a subjective formula no longer excludes judicial review if objective facts have to be ascertained before arriving at such satisfaction and the test of unreasonableness is not whether a particular person considers a particular course unreasonable, but whether it could be said that no reasonable person could consider that course reasonable ...

Second, it is to be observed that the section uses the word "morality" and not "public morality". The question that has assumed much importance in the present instance is what Parliament intended when it used the word "morality" in s. 9(1)(c) of the Act. Did it intend to confine itself only to public morality? Or did it intend to go much further and include private or personal morality as well? Since the legislative intent of Parliament is unclear from the language it has employed, we must resolve the ambiguity in accordance with well settled principles of statutory construction.

We refer, of course, to the time honoured guideline of contextual interpretation housed in the maxim *noscitur a sociis* which was explained by Gajendragadkar J, in *The State Of Bombay & Ors. v. The Hospital Mazdoor Sabha & Ors.* AIR [1960] SC 610, 613 as follows:

> This rule, according to Maxwell, means that, when two or more words which are susceptible of analogous meaning are coupled together they are understood to be used in their cognate sense. They take as it were their colour from each other, that is, the more general is restricted to a sense analogous to a less general. The same rule is thus interpreted in '*Words and Phrases*': (Vol. XIV, p. 207):
>
> > Associated words take their meaning from one another under the doctrine of *noscitur a sociis,* the philosophy of which is that the meaning of the doubtful word may be ascertained by reference to the meaning of words associated with it; such doctrine is broader than the maxim *ejusdem generis.*
>
> In fact the latter maxim 'is only an illustration or specific application of the broader maxim *noscitur a sociis*'. ... It must be borne in mind that *noscitur a sociis* is merely a rule of construction and it cannot prevail in cases where it is clear that the wider words have been deliberately used in order to make the scope of the defined word correspondingly wider. It is only where the intention of the legislature in associating wider words with words of narrower significance is doubtful, or otherwise not clear that the present rule of construction can be usefully applied.

In *Rohit Pulp & Paper Mills Ltd. v. Collector of Central Excise, Baroda* AIR [1991] SC 754, 762, Ranganathan J, when delivering the judgment of the Indian Supreme Court observed that the principle of construction housed in the maxim *noscitur a sociis* "has been applied in a number of contexts in judicial decisions where the court is clear in its mind that the larger meaning of the word in question could not have been intended in the context in which it has been used.

In *Richardson v. Austin* [1911] 12 CLR 463, the High Court of Australia was called upon to interpret the phrase "or other public passages or places" appearing in s. 25 of the Markets Act 1890 (Victoria). It was argued for the complainant that the word "places" meant "any place, whether public or private". The court rejected that contention and held that quite apart from the maxim *noscitur a sociis*, mere grammatical construction led to the conclusion that those words meant "or other public passages or **public** places. (See, Griffith CJ, at p. 468.)

Adopting the process of interpretation that has thus commended itself to us, we have come to the conclusion that the expression "morality" appearing in the foregoing provision means "public morality" and not the private or personal morality of an individual. We are therefore in agreement with the concession made during argument by Dato' Zaiton Zawiyah Puteh, learned Senior Federal Counsel who appeared for the first respondent, that the private morality of a person is an irrelevant consideration for purposes of cancellation of that person's Entry Permit under s. 9(1)(c) of the Act.

The next provision that calls for consideration is s. 59 of the Act. It reads:

> 59 No person and no member of a class of persons shall be given an opportunity of being heard before the Minister or the Director General, or in the case of an East Malaysian State, the State Authority makes any order against him in respect of any matter under this Act or any subsidiary legislation made under this Act.

It is a settled principle of public law that, absent a constitutional guarantee in that regard, Parliament may by clear words exclude the operation of the rules of natural justice. If authority is required in support of this proposition, it is to be found in *Kulasingam & Anor v. Commissioner of Lands, Federal Territory & Ors.* [1982] 1 MLJ 204, 211, where Abdoolcader J, (as he then was) said:

> The legislature can by clear words exclude the principles of natural justice **in the absence of specific constitutional guarantees.** In an appeal from New Zealand the Privy Council approved of the idea that natural justice could be effectively excluded by a legislative code in *Furnell v. Whangarei High Schools Board* [1973] AC 660, 679 which concerned the disciplinary code for New Zealand government teachers. Charges against a schoolteacher were investigated by a sub-committee which reported to the high school's board. Neither the sub-committee nor the board gave the schoolteacher an opportunity of making representations but he was suspended from teaching pending consideration and decision by the teachers' disciplinary board. The majority opinion held that the legislative code was not unfair and refused a writ of prohibition, stating (at p. 679) that it is not 'the function of the court to re-draft the code' and referring

with approval to the decision of the High Court of Australia in *Brettingham-Moore v. Municipality of St Leonards* [1969] 121 CLR 509, 524 which held in effect (at p. 524) that it is not for the court to amend the statute by engrafting upon it some other provision which it might think more consonant with a complete opportunity for an aggrieved person to present his views and to support them by evidentiary material. (Emphasis added.)

What the rules of natural justice broadly entail is to be found in the advice of the Judicial Committee delivered by Lord Denning in *Kanda v. Government of the Federation of Malaya* [1962] MLJ 169, at p. 172:

In the opinion of their Lordships, however the proper approach is somewhat different. The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: *Nemo judex in causa sua* and *audi alteram partem.* They have recently been put in the two words Impartiality and Fairness. But they are separate concepts and are governed by separate considerations.

Thus, it may be seen from the language in which s. 59 has been couched that it is the intention of Parliament to do away with the *audi alteram partem* limb of the rules of natural justice in the circumstances postulated by that section. The rules of natural justice, however, are a flexible concept whose categories are not closed. (See *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308.) Further, they merely form part of a much wider doctrine, namely, the duty to act fairly. Whether s. 59 has the far reaching consequence of excluding other facets of the wider doctrine, which the learned judge said it has, is a matter that will be dealt with later in this judgment.

We may add that we are happily spared the task of having to deal with the question whether the exclusion of the *audi alteram partem* rule, in the circumstances of the present case, contravenes arts. 5 and 8 of the Federal Constitution, since the point was not argued before us. We say "in the circumstances of the present case" advisedly because a written law may be held to be constitutional in certain circumstances and yet be declared unconstitutional when applied to a different set of circumstances, a proposition accepted by Abdoolcader SCJ (forming the majority of the Supreme Court) in *Public Prosecutor v. Dato Yap Peng* [1987] 2 MLJ 311, at p. 317, where he said:

In an advisory opinion under article 143 of the Constitution of India in *Re the Special Courts Bill,* [1978] AIR 1979 SC 478, Chandrachud CJ (at pp. 508-510) reformulated the principles in relation to the equivalent of our article 8, and in doing so stated *inter alia the principle that whether an enactment providing for special procedure for the trial of certain offences is or is not*

discriminatory and violative of the provision equivalent to our article 8 must be determined in each case as it arises, for no general rule applicable to all cases can safely be laid down, and a practical assessment of the operation of the law in the particular circumstances is necessary. (Emphasis added.)

The third provision of the Act that is relevant in the present instance is s. 65(1)(c) which reads:

> 65(1) In exercising his powers under Parts I to VI as a special law for an East Malaysian State the Director shall comply with any directions given to him by the State authority, being directions –
>
> (c) requiring him to cancel any Permit, Pass or Certificate issued to a specified person, or to deem a specified person to be an undesirable immigrant, or to declare that a specified person's presence in the East Malaysian State is unlawful, or to order a specified person's removal from the State.

It was argued for the appellant in the court below that despite the express words of this provision, the first respondent retained a discretion whether to comply with a direction given to him by the State authority, the second respondent before us. This argument was repeated before us and supported by Dato' Zaiton, the learned Senior Federal Counsel. The learned judge rejected this submission. We are in agreement with the learned judge. To accept the contention in favour of there being a residual discretion in the first respondent would be to fly in the face of the express words of the section.

We are also of the view that the learned judge was right in the way in which he approached the exercise of power by the first respondent when he said (at p. 31 of the appeal record):

> The act or decision of the Director (the first respondent in the appeal) following a direction of the State authority is really the act or decision of the State authority as the Director has no choice but to carry out the direction. Therefore, any challenge to the act of the Director under s. 65 is in fact a challenge to the decision or act of the State authority ...

Section 65(1) does not expressly set out the circumstances in which the State authority may direct the first respondent to exercise his power of cancellation. Does this mean that the State authority has untrammelled power under the Act to direct the cancellation of an Entry Permit? With respect, we do not think that Parliament intended to confer such power upon the State authority of an East Malaysian State. That legislative intent points in quite the opposite direction is evidenced by the opening words of s. 65(1). It says, "In exercising his powers under Parts I to VI", thereby referring to the sections appearing in those six Parts of the Act. Among these is s. 9(1)(c) which circumscribes the power of cancellation.

It follows that in the context of an East Malaysian State, the statutory pre-conditions appearing in s. 9(1)(c) *mutatits mutandis* govern the cancellation of an Entry Permit by the State Authority. In the context of the present case it means that the second respondent (the State authority of Sabah) could only direct the first respondent to cancel the appellant's Entry Permit after being objectively satisfied that one or more of the grounds set out in s. 9(1)(c) existed. We are therefore in agreement with the concession made before us by the learned Senior Federal Counsel that the second respondent in giving directions to cancel an Entry Permit under s. 65(1) must act within the scope of s. 9 of the Act.

Having made these observations, we will now deal with the two issues upon which this appeal falls to be determined.

Was There An Error Of Law?

In the court below, the appellant argued his application on the footing that his case came within s. 14 of the Act. From his written judgment it is clear that the judge also proceeded on the basis that s. 14 of the Act applied to the appellant's case. For completeness, we produce that section below:

> 14(1) Where the holder of any Permit seeks to enter Malaysia accompanied by any child whose name is not endorsed upon the Permit under section 12 and who is not otherwise entitled to enter Malaysia under this Act, the Director General may cancel the Permit issued to that person.
>
> (2) Where, upon the arrival in Malaysia of any person to whom a Permit or Certificate has been issued, the Director General is satisfied, as a result of inquiries made under section 24 or 26, or from other information, that the Permit or Certificate was issued as a result of any false representation or concealment of a material fact the Director General may cancel the Permit or Certificate.
>
> (3) Where at any time, during the period of validity of any Permit or Certificate, the Director General is satisfied that the holder of the Permit or Certificate is a prohibited immigrant the Director General shall cancel the Permit or Certificate.
>
> (4) Where any person has entered Malaysia by virtue of a Permit or Certificate, and the Director General is satisfied –
>
> (a) that any material statement made in or in connection with the application for that Permit or Certificate was false or misleading; or

(b) that the person is a prohibited immigrant, the Director General may declare at any time after the date of the entry, that the presence of that person in Malaysia is unlawful.

(5) On making any cancellation under subsection (2) or (3) or on making any declaration under subsection (4) the Director General shall, by notification, which, if the address of the person is known shall be sent to him at that address and otherwise shall be published in such manner as the Director General deems fit, inform the person affected thereby of the grounds on which the cancellation or declaration has been made and the person may appeal against the cancellation or declaration, as the case may be, within such time and in such manner as may be prescribed, to the Minister, whose decision shall be final.

However, the learned judge's note of the proceedings before him shows that the learned State Attorney General, during his argument, drew the court's attention to s. 9(1)(c) of the Act as the relevant and applicable provision. There is also recorded by the learned judge a statement by the learned State Attorney General to the effect that he was relying on s. 9(1)(c).

It therefore comes as a surprise that the learned judge decided the case before him based entirely on s. 14 of the Act without assigning any reasons for rejecting the State Attorney General's submission that s. 9(1)(c) was the applicable provision. If he did so only because of what the appellant had said – and a reading of the learned judge's judgment certainly conveys that impression – then he was plainly wrong. For no court is bound to decide a controversy upon an erroneous concession of law made by one of the disputants before it, more so when a question of statutory interpretation is involved. The most odd of results would follow if a contrary rule is to be applied. As Thorne J, observed in *P.M.N.T. Ramasamy Chetty v. Syed Alsagoff*, 7 FMSLR 93, at p. 120:

> [T]his court should disregard the admission [of counsel] on the grounds that it was an erroneous statement of law no more binding or authoritative than many other bizarre propositions of law to which courts have to listen.

We have already held that the second respondent must act in accordance with s. 9(1)(c) of the Act when exercising its power to direct the first respondent under s. 65(1). Now, having carefully considered the two provisions – ss. 9(1)(c) and 14 of the Act – we are entirely in agreement with the submissions of Dato' Zaiton and the learned State Attorney General that s. 14 has no application in the present instance. It is a provision that applies to immigrants generally. Section 9(1)(c) on the other hand specifically confers power upon the first respondent to cancel an Entry Permit granted to persons entering the Federation of Malaysia or any part thereof. In any event, we have it upon the authority of the learned State Attorney General that those

instructing him acted pursuant to s. 9(1)(c) of the Act when cancelling the appellant's Entry Permit. We are therefore of the view that the learned judge misdirected himself in law when he failed to have any regard to the provisions of s. 9(1)(c) of the Act.

When dealing with the question whether the decision to cancel the appellant's Entry Permit was vitiated by an error of law, the learned judge confined himself to the narrow question posed by counsel for the appellant. He then appears to have looked for some specific misdirection of law on the part of the first respondent in the context of ss. 14 and 65 of the Act. The following two passages in the judgment demonstrate the approach taken by learned judge.

First, at p. 33 of the Appeal Record:

> It will recalled that the Director acted to cancel the Entry Pass after he was directed to do so by the State authority under s. 65. Mr. Shafee contended that the Director can only cancel the Entry Permit under s. 14 and can only make the declaration under s. 14(4) and since the Director acted, instead, under s. 65, he had committed an error of law.

Second at pp. 42-44 of the Appeal Record:

> Section 14 relating to the cancellation of Entry Permit provides for only the Director General to act and for an appeal against his decision to the Minister. Section 64(3) made provision for a Director for each of the East Malaysian states and for them to exercise the powers exercisable by the Director General. This is one of the modifications to be taken into account when applying s. 14 to Sabah. Another modification is that the Director must comply with the direction of the State authority that requires him to cancel an Entry Permit. Pausing here, it is pertinent to ask whether Parliament intended that the Director should conduct the enquiries provided under s. 14 before he complies with the direction? Another pertinent question is does Parliament intend to allow the Director to defy the direction if after enquiries he somehow forms the view that the Entry Permit should not be cancelled? Before answering those questions, it must be borne in mind firstly that Sabah had the right to refuse admission to its state except for, as examples, certain category of persons like judges, civil servants and ministers. Secondly, any person, including a Malaysian, who is not of Sabah origin is to be regarded as a non-citizen, that is, an alien (s. 66(3)). Thirdly, all this came about as a condition for Sabah joining in the formation of Malaysia. As for the question of whether Parliament had intended an enquiry be conducted before the Director complied with the direction of the State authority, the answer is surely no. That requirement of s. 14 had been modified or over-ridden by the right of the State authority to direct the cancellation of the Entry Permit. No such power was given to the State authority under s. 14 because there was no such entity then and therefore it could not have been intended then that such an entity be subject to the

> requirement of making enquiry before the cancellation of the Entry Permit. The entity of the State authority is the creation of Part VII of the Act pursuant to the Malaysia Agreement. Part VII is to give effect to the right of the state over immigration matters and contains the all new provision for the State authority to decide to cancel an Entry Permit and for the Director to carry out its decision. There is no provision that the State authority must conduct an enquiry before deciding on cancelling an Entry Permit before the coming into existence of Part VII and no new provision was made for an enquiry under Part VII. Therefore, it is my view that no inquiry, whether by the Director or by the State authority, is intended by Parliament. If the whole purpose of Part VII was to protect the East Malaysian states over immigration matter, then it is unthinkable that Parliament would intend that those all important matters, in fact, they form one of the bases for Sabah agreeing to the formation of Malaysia, could be whittled away by a construction that allowed a Director to defy the direction of the State authority which surely would be the effect if the requirement of an inquiry is imposed. Therefore, to accede to the construction urged by Mr. Shafee would have the effect of making the special provisions of Part VII which gives protection to the East Malaysia states on immigration matters illusory because that construction would result in the State authority not being able to initiate any action to cancel any Entry Permit. As for the answer to the second question, it is clear that Parliament had intended that the Director should follow whatever direction given by the State authority under s. 65.

With respect, we find this too narrow an approach. An error of law in the context of public law is a broad concept. It is not limited to a mere misconstruction by a public decision-maker of the provision of the empowering statute. What public law classifies as an "error of law" has already received curial treatment and we find it sufficient to quote the following passage from one of the judgments delivered by this court in *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers' Union* [1995] 2 MLJ 317, 340:

> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

In this context we may mention that the learned judge does not appear to have evaluated the affidavit evidence presented to him. Indeed, it is apparent from his judgment that he did not address his mind at all to the evidence led before him. This in our view constitutes a serious non-direction on the part of the learned judge.

By reason of what we have said thus far, we are of the view that the validity of the cancellation of the appellant's Entry Permit should be examined against s. 9(1)(c) of the Act, having regard to the criteria postulated by that subsection and the matters that were taken into account by the respondents when making the impugned decision. We have earlier in this judgment produced sub-s. 9(1)(1)(c) which contains the relevant considerations that circumscribe the exercise of the power to cancel an Entry Permit conferred by that section. We have also observed that an Entry Permit may be cancelled upon grounds of public morality.

The considerations that were taken into account when exercising the power to cancel the appellant's Entry Permit in the present case appear sufficiently in paras. 5 to 16 of the affidavit of Datuk Ghulam Jelani bin Khanizaman, the Secretary of Internal Affairs and Research of the Chief Minister's Department, affirmed on 18 December 1997. These paragraphs read as follows:

> 5. Since 1980, the State Government has received several petitions from Mr. Richard Ng of Kota Kinabalu dated 12th March 1990, from Mr. Jus Bin Balitus @ Stanislaus of Penampang dated 10th April 1990 and from Mr. Muthu Sagaran of Kota Kinabalu dated 10th April 1990, alleging that the Applicant had one time or another caused the break-up of their respective families. Copies of the said petition are now shown to me and annexed hereto and marked as exhibits "GJK-2", "GJK-3" and "GJK-4" respectively.
>
> 6. The said allegations were communicated to the Applicant to show cause by the State Attorney-General's letter dated 14th April 1990. A copy of the said letter is now shown to me and annexed hereto and marked as exhibit "GJK-5".
>
> 7. The Applicant married one Theresa Kinson at the St. Michael's Church, Penampang, on 27th November 1976. A copy of the marriage certificate dated 27th November 1976 is shown to me and annexed hereto and marked as exhibit "GJK-6".
>
> 8. However, he was converted to Muslim on 21st July 1980. A copy of the letter dated 8th February 1995 from the Applicant enclosing a letter from Majlis Ugama Islam Sabah confirming the conversion is shown to me and annexed hereto and marked as exhibit "GJK-7". His then wife Theresa Kinson was not converted with him.
>
> 9. On 2nd June 1986, he married one Shanti Satkuna Nathan @ Shanti Nathan (the ex-wife of Mr. Muthu Sagaran) according to Muslim rites of marriage. A copy of the marriage certificate dated 5th June 1986 is shown to me and annexed hereto and marked as exhibit "GJK-8".

10. While being a Muslim and still married to Shanti Satkuna Nathan @ Shanti Nathan, the Applicant continued to cohabit with Theresa Kinson (who is a non-Muslim) and out of such cohabitation, three children namely Kelly Darren Balakrishnan (born on 14.06.1981), Jason Daniel Balakrishnan (born on 21.06.1986) and Elsa Sugurmarie S. Balakrishnan (born on 12.02.1988) were born. Copies of the birth certificates are shown to me and annexed hereto and marked as exhibits "GJK-9", "GJK-10" and "GJK-11".

11. I am advised by my solicitor and verily believe such cohabitation is contrary to the religion of Islam.

12. The Applicant has since divorced Shanti Satkuna Nathan @ Shanti Nathan and married his present wife Bibi Gulshon, who is a Muslim.

13. Owing to the above reasons, the Applicant's application for permanent stay in Sabah had been consistently rejected by the State Government even though the State Government has no objection to the Respondent granting him a work pass.

14. Thus, the Applicant had been working in Sabah under a work pass until 27th December 1995 when an Entry Permit was granted to him by the Respondent based on a hand-written footnote purportedly given by the former Chief Minister, Datuk Sri Panglima Mohd. Salleh bin Tun Said, on a letter of appeal dated 21st December 1995 submitted to him by the Applicant at Sri Gaya, Kota Kinabalu, the official residence of the Chief Minister. The said letter of appeal was not sent through official channel and as such no copy of the said letter is found in the official file of the State Government. A copy of the said letter provided by the Respondent is now shown to me and annexed hereto and marked as exhibit "GJK-12".

15. Thus, there was no official communication by the State Authority to the Respondent approving the Applicant's application for permanent stay in Sabah and as such there is no official record in our file that the Applicant was granted an Entry Permit until I found out from the Respondent sometime in May 1997.

16. In the circumstances, based on the matters as deposed to above I issued a direction dated 10th November 1997 under section 65(1)(c) of the said Act directing the Respondent to cancel the Entry Permit issued to the Applicant on 27th December 1995 as the applicant's continuous presence in Sabah is prejudicial to the morality in Sabah. A copy of the said direction dated 10th November 1997 is now shown to me and annexed hereto as exhibit "GJK-13".

The foregoing paragraphs make it clear that the second respondent took into account allegations that are stale and which only tend to show that the appellant is a man of poor personal morals. But they bear no relevance whatsoever upon the issue of public morality which is the consideration the Act has made relevant for purposes of cancelling an Entry Permit. On the respondents' own evidence, therefore, this is not a case of a person whose presence in Sabah is, or would be prejudicial to public morality.

To this, the learned State Attorney General has two responses. His first response is that the second respondent is under no duty to provide reasons for directing the first respondent to cancel the appellant's Entry Permit because of s. 59 of the Act. He says that no inference could have been drawn against the second respondent if it chose not to provide reasons for doing what it did. It is therefore irrelevant if the second respondent gives bad reasons for directing the first respondent to cancel the appellant's Entry Permit. With respect, we are unable to accede to these submissions.

Assuming, but not deciding for the present, that there is no duty upon the second respondent to give reasons for directing a cancellation of the appellant's Entry Permit, the argument made at the Bar overlooks the fact that reasons have indeed been given in this case. Once reasons are given by a public decision-maker for his decision, they may be examined by the court. And if it is found that the reasons disclosed constitute considerations foreign to those stipulated by the empowering statute, the court is obliged to hold that the decision is not in accordance with law. As Salleh Abas LP said in *Re Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182, at p. 188:

> [I]f facts are furnished voluntarily, exhaustively and in great detail as in this case for consideration of the court it would be naive to preclude the judge from making his own evaluation and assessment to come to a reasonable conclusion.

With respect, therefore, the approach suggested by the learned State Attorney General appears to us to resemble the physically impossible task of trying to pass through a brick wall by pretending that it does not exist.

The second answer advanced by the learned State Attorney General is that he had, in any event, informed the learned judge that the second respondent was prepared to abandon all matters set out in paras. 5 and 6 of the affidavit of Datuk Ghulam Jelani bin Khanizaman. He drew our attention to the note of proceedings recorded by the learned judge which refer to the appellant's application to strike out certain objectionable parts of the aforesaid affidavit. The relevant portion of the note reads as follows (Appeal Record, p. 88-89):

Foo: Should indicate the parts of the affidavit which they find objectionable

Shafee: Objectionable parts of affidavit are paragraphs 5, 6, 10, 11 and 13

Foo: Prepared to have 5 and 6 dropped but will still rely on 10, 11 and 13.

Court: I will deal with the admissibility of paragraphs 10, 11 and 13 when the substantive motion is argued. I come now to the application for amendment.

Based on this note, the learned State Attorney General has argued that it is not open to the appellant to rely on the material appearing in paras. 5 and 6 of Datuk Ghulam Jelani's affidavit. He says that there is accordingly no available material upon which the second respondent's decision may be criticised.

We however find that two matters of factual importance stand in the way of the arguments advanced in support of the second response. In the first place, we note that this is not a case where the offending paragraphs in an affidavit were expunged. Indeed, we find that despite this exchange between counsel appearing on the foregoing note, appellant's counsel, without any protest from any quarter, did in fact refer to and make submissions upon the matters deposed to in paras. 5 and 6 of the affidavit in question. (See, p. 94 of the Appeal Record). Secondly, it does not appear from the written judgment that the learned judge made any ruling upon the admissibility of paras. 10, 11 and 13 of Datuk Ghulam Jelani's affidavit. As such it would be quite wrong to now preclude the appellant from merely repeating before us what he had already put forward in the court below in terms of criticism of the evidence already available. In the premises, we once again find ourselves unable to agree with the arguments of the learned State Attorney General upon the point under discussion.

In logical sequence, then, we arrive at the conclusion: (1) that the reasons disclosed in Datuk Ghulam Jelani's affidavit are open to curial scrutiny; (2) that upon examination it is found that the appellant's Entry Permit was directed to be cancelled because of his private morals; (3) that such consideration is not one of those prescribed by s. 9(1)(c) of the Act pursuant to which provision the second respondent admittedly acted; and (4) that in the result the decision to cancel the appellant's Entry Permit was not in accordance with law.

The reasons we have thus far given are in themselves sufficient to grant the orders of *certiorari* sought in the appellant's amended motion of 20 November 1997. But we find that there is a further ground upon which the appellant is entitled to succeed.

Duty To Act Fairly: General Observations

The passages in the judgment of the learned judge earlier quoted make plain that he was of the view that s. 65 is a special provision uncontrolled by any of the other provisions in the Act. It must then logically follow that a State authority of an East Malaysian State has unfettered power to regulate immigration within its borders. The judgment when read as a whole certainly conveys the impression that such a conclusion appealed to the judge as being correct in law. Regrettably, however, we must enter our most vigorous dissent against such a proposition.

While the East Malaysian States have certain rights and privileges reserved unto them by the Federal Constitution, particularly in matters pertaining to immigration, they, like the Federal Government and the Government of any of the West Malaysian States, are bound by the terms of the Federal Constitution. Indeed, there is none within the shores of Malaysia who is ever so high that the supreme law is not above him. Every public decision-maker, including the State authority of an East Malaysian State is accordingly under a duty to observe the provisions of the Federal Constitution. And it is an elementary principle of our constitutional law that no Act of Parliament may authorise a public decision-maker to act contrary to the supreme law.

Article 8(1) of the Federal Constitution strikes at the heart of arbitrariness in public decision-making and imposes a duty upon a public decision-maker to act fairly. See, *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor. (supra)*. The second respondent before us is no different from any other public decision-maker. It too is under a duty to act fairly in exercising the powers conferred upon it by the Act.

Until very recently, it was thought that the duty to act fairly was confined to affording only procedural fairness in a public decision-making process. The proposition was expressed in the time-honoured formula: judicial review is concerned with the decision making process and not with the decision itself.

The fallacy of this approach was exposed by the landmark decision of the Federal Court in *R Rama Chandran v. Industrial Court of Malaysia & Anor. (supra)*. In a judgment that broke new ground, Edgar Joseph Jr. FCJ, after a careful analysis of the authorities that hold the field in this area of the law, concluded that public law recognises challenges not only on procedural, but also on substantive grounds. His Lordship said:

It is often said that Judicial Review is concerned not with the decision but the decision making process. (See eg *Chief Constable of North Wales Police v. Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in Judicial Review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in Council of *Civil Service Unions & Ors v. Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.

But Lord Diplock's other grounds for impugning a decision susceptible to Judicial Review make it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinize such decisions not only for process, but also for substance.

In this context, it is useful to note how Lord Diplock (at pp. 410–411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationality, and (iii) procedural impropriety. This is how he put it:

> By 'illegality' as a ground for Judicial Review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the Courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] AC 14, of irrationality as a ground for a Court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision-maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.
>
> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to Judicial Review under this head

> covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

Lord Diplock also mentioned 'proportionality' as a possible fourth ground of review which called for development.

Lord Diplock's first ground for challenge, namely, 'illegality', involves insisting that the authority or body whose decision is being impugned has kept strictly within the perimeters of their powers. A good example of this is the case of *Westminster City Council v. Great Portland Estates plc* [1985] AC 661, an *ultra vires* case, involving judicial construction of the Town and Country Planning Act 1971. The question for decision was whether the Act permitted the relevant authorities, by resort to their development plans, to support the retention of traditional industries or was the ambit of the Act such as to permit only 'land use' aims to be pursued? It was held that 'the character of the use of the land, not the particular purpose of a particular occupier' was the concern of planning and, therefore the authority, could not be seen to favour any particular occupant or class of occupant. By thus confining the relevant authority strictly to the four walls of the powers conferred upon them by the Act, the court was involved in the exercise of reviewing the impugned decision for substance and not just process.

Lord Diplock's second ground for challenge, namely, 'irrationality' recognises a different route whereby the substance of a decision may be reviewed by the courts. **By this means, Lord Diplock made it clear that despite being legal, that is to say within the powers conferred, a decision may nevertheless, be struck down, for being contrary to substantive principles.** In the words of Lord Diplock, 'a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.'

In this regard, the case of *Hall & Co Ltd v. Storeham-By-Sea UDC & Anor* [1964] 1 All ER 1, a planning case, affords a good illustration of how the courts in the United Kingdom do in practice review a decision for substance even though it may comply with the legislative scheme. The defendant had granted the plaintiffs planning permission subject to conditions that required them to construct a road on their land and dedicate its use to the public. No compensation was payable to them for the loss of the land to be used for the road. Under town and country planning law, a local authority may in granting planning permission, impose such conditions as it may think fit. The court struck down the condition, one of the grounds being that the condition was void for unreasonableness. On the one hand, while viewed from a traffic engineering point of view, the defendant's object was 'perfectly reasonable', but on the other hand, the course they adopted was 'utterly unreasonable'. **In effect, the court had examined the decision for substance, and held that the imposition of the condition was an abuse of power and unlawful.** It is

implicit in this decision that the court was indirectly enforcing the fundamental civil right to be compensated adequately for property compulsorily acquired.

Lord Diplock's third ground of Judicial Review – procedural impropriety which involves reviewing a decision for process – requires no comment, having regard to the topic I am now addressing.

Turning to Lord Diplock's fourth ground of Judicial Review – namely, proportionality – there are cases in the United Kingdom which point to the conclusion that even where EEC law is not applicable, such a principle has been recognised as a general principle of English law, and when applied, it enables the court to review an impugned decision for substance as well as process. In this context, I have in mind cases such as *R v. Barnesley MBC, ex p Hook* [1976] 1 WLR 1052; *Wheeler v. Leicester City Council* [1985] AC 1054 and *London Borough of Brent, ex p Assegai* The Times, 18 June 1987. (Emphasis added.)

These views of his Lordship were subsequently affirmed by a unanimous Federal Court in *Kumpulan Perangsang Selangor Bhd. v. Zaid bin Hj. Mohd Noh* [1997] 1 MLJ 789 in the following terms (at p. 799):

In our judgment, the correct approach to the '*Wednesbury* unreasonableness' and the proportionality tests is that adopted by Lord Denning MR in the Court of Appeal in *Evans.* We therefore find the criticism of his approach by the House to be unwarranted. The continued reluctance of English courts to come to grips with the practical realities of applying the '*Wednesbury* unreasonableness' test (see, for example, *R v. Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696) in no way deters us from accepting as correct the view expressed by Edgar Joseph Jr FCJ in *R. Rama Chandran. An examination of the merits of a decision followed by a result that no reasonable person or body similarly circumstanced could have come to the conclusion in question and a making of the decision that ought to have been made in the first place, does not, in our view, occasion an abuse of judicial power by an unjustified or unauthorised assumption of appellate power in certiorari proceedings.* (Emphasis added.)

We may add that the principle established by *R. Rama Chandran (ibid)* has already been applied by this court in other cases. See, eg, *Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489.

The result of the decision in *R. Rama Chandran (supra)* and the cases that have followed it is that the duty to act fairly is recognised to comprise of two limbs: procedural fairness **and** substantive fairness. Procedural fairness requires that when arriving at a decision, a public decision-maker must adopt a fair procedure. The doctrine of substantive fairness requires a public decision-maker to arrive at a reasonable decision and to ensure that any punishment he imposes is not disproportionate to the wrongdoing complained of. It follows

that if in arriving at a public law decision, the decision-maker metes out procedural fairness, the decision may nevertheless be struck down if it is found to be unfair in substance.

Although the learned judge referred to *R. Rama Chandran* in his judgment, he did not, as will appear in a moment, sufficiently appreciate the wealth of public law jurisprudence flowing from the majority judgments in that case. Indeed the learned judge entirely missed the issue central to the case and canvassed at length before him by the appellant's counsel. It therefore behoves us to address the point fully and deal with the application of the doctrine of fairness to the present instance.

Duty To Act Fairly: Procedural Fairness

We are fully conscious that this is a case where it is not strictly necessary for us to deal with the applicability of the procedural limb of the doctrine to the present instance. Nevertheless we find it desirable to do so because of the views expressed by the learned judge upon the duty to give reasons. This is how he dealt with the point (at pp. 53-54 of the Appeal Record):

> Mr. Shafee submitted that because no reasons were given for the cancellation the decision to cancel must be irrational and the court ought to proceed to consider the materiality or relevance of the failure to provide reasons. Learned counsel cited *Minister of Human Resources & Ors v. National Union of Hotel, Bar and Restaurant Workers, Semenanjung Malaysia and Anor Appeal* [1997] 3 MLJ 377 CA. The facts of that case are totally different from the present and the subject matter there concerns the Trade Union Regulations 1959. Factually, it is of no help to the Applicant's case. As for the cited statement of law, it is also of no help. The Court of Appeal there held that the absence of reasons for a decision where there was no duty to give them could not of itself provide any support for the suggested irrationality of the decision.
>
> It was also submitted that the present case is not one which involves public policy, national interest, public safety or national security and the court is therefore, submitted learned counsel, entitled to carry out an objective examination of the factual matrix presented to it to ascertain whether a reasonable tribunal similarly circumstanced would have come to the decision as the Director did, citing in support *R. Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 FC, *Kumpulan Perangsang Selangor Bhd v. Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 SC and *Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489 CA. *None of those cases are concerned with the right of the East Malaysian states over immigration matters and the right of the Executive, that is the State authority, to cancel an Entry Permit. Therefore they cannot be relied on for deciding the questions herein.* As for the question of public policy I am unable to agree that this case is not concerned with it. It is very much so because it

> involves the manner in which a state Executive or the State authority goes about overseeing immigration matters. It is unthinkable for the court to venture into making decision as to when and whom should be issued an Entry Permit and as to when and why an Entry Permit should be cancelled. Those are surely matters of policy which are best left to the Executive. Furthermore, since the Director must and had acted in compliance with the direction of the State authority as required by s. 65, there is no question of giving any reason because he has no choice of action and it should be apparent to the applicant that the Director had acted under direction. **Also, by virtue of ss. 59 and 59A, the Director is not obliged to give any reasons.** (Emphasis added.)

Upon these passages we have the following comments to make.

First, we are, with respect, unable to agree with the approach adopted by the learned judge. It is too narrow and restrictive. He treats *R. Rama Chandran* and the other cases merely as decisions upon their own facts. They are not. They are cases that lay down important principles of public law and apply them to particular fact patterns. They are authority for the proposition that judicial review of a public law decision is not confined to procedural fairness but includes substantive fairness.

Second, the learned judge seems to have misunderstood his role in judicial review proceedings. All that he was asked to do was to review the fairness of the second respondent's decision to cancel the appellant's Entry Permit. If he came to the conclusion, having regard to the objective facts before him, that the decision was fair and reasonable he was entitled to say as much and refuse the application. On the other hand, if he came to quite the opposite conclusion, it was his plain duty to quash the act of cancellation. Unlike *R. Rama Chandran* and *Harris Solid State* here is not a case where the court was moved to substitute its decision for that of the second respondent State authority. Had such an attempt been made, then, and then only, would the public policy considerations to which the judge alluded have become relevant. In the state in which the application rested before him, public policy was a wholly irrelevant consideration. The judge ought to have ignored it.

Third, counsel for the appellant and the learned judge appear to have proceeded upon the basis that no reasons had been given for the impugned decision. In this they were both clearly wrong. This is a case where detailed reasons were given by the second respondent for its decision. Those reasons are to be found in Datuk Ghulam Jelani's affidavit. It is to be remembered that the giving of reasons for a public law decision is not only confined to disclosures made contemporaneously with the impugned decision. It includes reasons made available to the court when the decision is challenged: *Re Tan Sri Raja Khalid bin Raja Harun (ibid)*. The question whether the respondents were under a

duty to furnish reasons is therefore entirely academic in the present instance. That is why we prefaced our discussion on this aspect of the case with the observation that it was not strictly necessary.

Fourth and last, we are in agreement with so much of the learned judge's judgment that holds that the first respondent need not furnish reasons for cancelling the appellant's Entry Permit. Where we part company with the learned judge is the grounds he has advanced for his conclusion. In our judgment, neither s. 59 nor s. 59A have the effect of excluding the duty to give reasons. As we have earlier said, all that s. 59 does is to deprive an aggrieved person of the benefit of the *audi alteram partem* rule. Upon its language it certainly has no effect upon other facets of the duty to accord procedural fairness, including the duty to give reasons. Similarly, s. 59A is an attempt to immunize decisions made under the Act. It has not the effect the learned judge thought it had. In our judgment, the true principle upon which the first respondent ought not to be required to furnish reasons in a case under s. 65 of the Act is that he is a mere amanuensis of the second respondent. Even if he does furnish reasons, all he can say is that he acted in accordance with the direction given him by the second respondent. Since we already know this from the terms of s. 65, it becomes unnecessary for the court to look to the first respondent for his reasons. But we must say in all fairness to the first respondent that the incumbent to that office did in fact file an affidavit in the court below in which, apart from making some very general statements, he says he cancelled the appellant's Entry Permit because he was directed to do so by the second respondent.

So much for our comment upon the views expressed by the learned judge.

Upon the doctrine of procedural fairness we find it useful to re-state the more obvious principles that operate in the environment of public law.

1. The doctrine of procedural fairness includes, but is wider than the rules of natural justice. It encompasses all aspects of fair play in the procedure adopted during a decision making process.

2. Although the test by which it is gauged is objective, the degree of fairness of the particular procedure adopted is subjective in the sense that it depends upon the peculiar facts and circumstances of the case. It is therefore neither feasible nor desirable to attempt an exhaustive list of what amounts to procedural fairness.

3. However, there are certain well-recognised classes that fall within the scope of the duty. It includes, for example, the duty of a public decision-maker to furnish reasons for his decision. In *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan (supra)*, this court held (at p. 536) that:

> ... as a general rule, procedural fairness, which includes the giving of reasons for a decision, must be extended to all cases where a fundamental liberty guaranteed by the Federal Constitution is adversely affected in consequence of a decision taken by a public decision-maker. Whether a particular right is a fundamental liberty, and therefore falls within the wide encompass of any of the articles under Part II of the Federal Constitution is a question that has to be dealt with on a case by case basis. Suffice to say that the instant appeals are concerned with a fundamental liberty.

This view has been criticised by Professor M.P. Jain in the third edition of his work *Administrative Law of Malaysia and Singapore* (see p. 428) as being too restrictive. Criticism that comes from so eminent a source must, in our opinion, be given due weight. Indeed, after careful consideration we find the criticism to be justified. We therefore consider it wrong to limit the duty to give reasons only to cases concerning fundamental liberties when the authorities that precede *Hong Leong Equipment* do not impose any such restriction. See, eg, *Pahang South Union Omnibus Co Bhd v. Minister of Labour and Manpower & Anor* [1981] 2 MLJ 199. In our view the duty extends to all cases where the rights of a person are adversely affected by a public law decision.

4. A public decision-maker may not be procedurally compelled to furnish reasons for his decision. However, the absence of reasons may warrant the drawing of what we will call "the Padfield inference", that is to say, the inference that there are no good reasons for the impugned decision. See, *Padfield v. Minister of Agriculture, Fisheries & Food* [1968] AC 997. In other words,

> "courts will take into account any reasons which the body may give for its decisions. If it gives no reasons – in a case when it may reasonably be expected to do so, the courts may infer that it has no good reason for reaching its conclusion, and act accordingly." *General Electric Co Ltd v. Price Commission* [1975] ICR 1 at p. 12, per Lord Denning M.R.

5. There are cases which by their very nature render it neither feasible nor desirable to require a public decision-maker to give reasons for his decision. These include cases that concern national security, public safety or public interest. See, *Re Tan Sri Raja Khalid bin Raja Harun (ibid)*; *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan (supra)*.

Duty To Act Fairly: Substantive Fairness

Whether the decision to cancel the appellant's Entry Permit was substantively fair is a question which the learned judge did not consider at all. Evidentially speaking, there was material before him upon the issue by way of the affidavit of Datuk Ghulam Jelani to which we have already referred. The very same material is now available to us in the Appeal Record. It is therefore open to this court, in the light of the arguments advanced both in the court below and in the second appeal, to deal with the point.

When considering the issue of substantive fairness the question that falls for determination is whether a reasonable State authority would have directed the cancellation of the appellant's Entry Permit on the basis of the facts upon which the second respondent acted. Having regard to the objective facts of this case, that question must, in our judgment, receive a negative response.

It cannot be overlooked that the State of Sabah granted the appellant an Entry Permit despite having in its possession material, albeit outdated, that he was a person of low moral fibre. Since the existence of such unfavourable information did not prevent the grant of an Entry Permit, it is most unreasonable to rely upon the very same information to direct a cancellation. Put differently, if poor morals was no bar to the grant of an Entry Permit, they surely cannot form the basis for a cancellation. Unfortunately this aspect of the case did not receive any consideration from the learned judge.

We are also of the view that the points we have made thus far provide an equally satisfactory answer to the submissions based on policy considerations advanced by the learned State Attorney General. It was argued that it is entirely a matter for the State authority of Sabah to decide the kind of persons who should be permitted to belong to that State under the Entry Permit system. It was said, in effect, that bad moral character is a ground upon which the State authority may direct the cancellation of an Entry Permit and thereby prevent a person from "belonging" to Sabah under s. 71 of the Act. With respect, we regret we are unable to accept this submission. The State authority is under a duty to exercise its powers in accordance with those Articles of the Federal Constitution that confer fundamental liberties.

In the premises, we are of the very respectful view that the decision by the second respondent to direct a cancellation of the appellant's Entry Permit is not substantively fair.

a

The Result

For the reasons we have already given, the cancellation of the appellant's Entry Permit is null and void and of no effect. It follows that both the first and second appeals succeed and that *certiorari* must issue to remove and quash the cancellation of the appellant's Entry Permit. With the quashing of the cancellation the decision of the second respondent housed in the act of cancellation must, as a matter of pure consequence, meet with the same fate. We would therefore make the following orders in respect of the first appeal:

b

1. the appeal is allowed;

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2. the order of Ian Chin J, made on 26 December 1997 is hereby set aside;

3. there shall be an order in terms of prayer (1) of the appellant's amended notice of motion;

d

4. the costs of the first appeal and all costs occasioned in the court below shall be taxed and paid by the second respondent to the appellant;

5. there shall be no order as to costs against the first respondent;

6. the deposit lodged in court shall be refunded to the appellant.

e

In respect of the second appeal we make the following orders:

1. the appeal is allowed;

2. the order of Sulaiman Hashim J, is set aside;

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3. there shall be no order as to costs of the appeal.

4. the deposit lodged in court shall be refunded to the appellant.

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